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TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1937

No. 42

JAMES D. SMYTH, EXECUTOR OF THE ESTATE OF JAMES F. RANSOM, DECEASED, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 7, 1937.

CERTIORARI GRANTED JUNE 1, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 960

JAMES D. SMYTH, EXECUTOR OF THE ESTATE OF JAMES F. RANSOM, DECEASED, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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[fol. 1]

IN UNITED STATES COURT OF CLAIMS

No. 43234

JAMES D. SMYTH, Executor of the Estate of James J. Ransom, Deceased, Burlington, Iowa, Plaintiff,

vs.

THE UNITED STATES, Defendant

I. PETITION—Filed December 31, 1935

1. Plaintiff is a citizen of the United States, and a citizen and resident of the State of Iowa, and is the sole Executor of the Estate of James J. Ransom, Deceased, appointed by the District Court of Des Moines County, Iowa, and has duly qualified as such executor, and is now acting as such.

2. Plaintiff, as such Executor, is the owner, holder for value and bearer of an obligation of the United States of America, in principal amount of Ten Thousand Dollars ($10,000.00), known as First Liberty Loan 3½% Gold Bond of 1932-1947, Serial Number 6670, a copy of which is annexed hereto and made a part hereof, marked "Schedule A." Said bond is one of a series of 15/30 Year 3½% Gold Bonds, authorized by an Act of Congress approved April 24, 1917, and issued pursuant to Treasury Department Circular No. 78, dated May 14, 1917, a copy of relevant provisions of which is annexed hereto and made a part hereof, marked "Schedule B." By the terms of said bond, the defendant promised to pay to bearer on June 15, 1947, the principal sum of Ten Thousand Dollars in United States [fol. 2] gold coin of the standard of value on the date of issuance, June 15, 1917, and to pay interest on said principal sum in like gold coin at the rate of three and one-half per cent (3½%) per annum from the date of the bond, on December fifteenth and June fifteenth in each year, until the principal should be payable, upon presentation and surrender of the interest coupons as they severally mature.

3. Plaintiff is the owner, holder for value and bearer of an interest coupon, attached to said bond, a copy of which

is attached hereto and made a part hereof, marked "Schedule C," by the terms of which defendant promised to pay to bearer on December 15, 1935, the sum of One Hundred Seventy-Five Dollars ($175.00) in United States gold coin of the standard of value on the date of issuance, being six months' interest due December 15, 1935, on the bond hereinbefore referred to.

4. Under and pursuant to the laws of the United States, namely: an Act approved March 14, 1900 (31 Stat. 45), which was in force on June 15, 1917, at the time of the issuance of said bond, a dollar in gold consisted of twenty-five and eight-tenths (25-8/10) grains of gold, nine-tenths (9/10) fine.

5. The aforesaid bond and circular contained provisions that all or any of the bonds of its series might be redeemed at the pleasure of the United States on or after June 15, 1932, at par and accrued interest, in United States gold coin of the standard of value on the date of issuance, and that from the date of redemption designated interest on bonds called for redemption should cease. On March 14, 1935, Secretary of the Treasury of the defendant, by a public notice, a copy of which is hereto attached and made a part hereof, marked "Schedule D," purported on behalf of defendant to call for redemption on June 15, 1935, said issue of First Liberty Loan 3½% Gold Bonds of 1932-47.

[fol. 3] 6. On December 28, 1935, plaintiff duly presented said bond, together with interest coupon due December 15, 1935, and all subsequent interest coupons attached, to the Treasurer of the United States, Washington, D. C., in accordance with said Act of April 24, 1917, said Treasury Department Circular No. 78, and said public notice of March 14, 1935, as supplemented by Treasury Department Circular No. 535, a copy of the relevant provisions of which is hereto attached and made a part hereof, marked "Schedule E," and demanded redemption of said bond by the payment of ten thousand gold dollars, each containing twenty-five and eight-tenths grains of gold, nine-tenths fine. The defendant refused to redeem said bond in accordance with its terms, or in any manner except by the payment of ten thousand dollars in legal tender currency. Plaintiff thereupon refused to accept said currency, or permit the

redemption of said bond, and is still the owner, holder and bearer of said bond.

7. Thereafter, and on December 28, 1935, plaintiff duly presented to the defendant at the Treasury Department, Washington, D. C., the aforesaid interest coupon due December 15, 1935, in accordance with said Act of April 24, 1917, and said Treasury Department Circular No. 78, and demanded payment thereof in the sum of One Hundred-Seventy-Five Dollars ($175.00) either in gold coin or legal tender currency. Defendant thereupon refused payment of said coupon, on the ground that the bond to which it was attached had been previously called for redemption.

8. Plaintiff is informed and believes that defendant's refusal on December 28, 1935, to pay to plaintiff ten thousand gold dollars, each containing twenty-five and eight-tenths grains of gold, nine-tenths fine, as provided in said bond, was based on the ground that the Joint Resolution of the Seventy-Third Congress, approved June 5, 1933, (C. 48, 48 Stat. 112) nullified the provisions of said bond requiring [fol. 4] payment in gold. Plaintiff says that said Joint Resolution, insofar as it attempted to override the obligation created by the aforesaid bond and coupons, was beyond the power of Congress to adopt, and was unconstitutional and void, and violated the provisions of the Fifth Amendment, and of Section 4 of the Fourteenth Amendment, to the Constitution of the United States.

9. Plaintiff says that defendant had no right to call said bond for redemption except by public act of the Congress of the United States, that no such public act was passed by Congress, and that said bond is still unredeemed and in full force and effect.

10. Plaintiff says that neither on March 14, 1935, nor at any time subsequent thereto have United States notes been convertible into coin at the option of the holder, nor could United States bonds bearing a lower rate of interest than said bond of plaintiff have been sold at par in coin. Plaintiff therefore says defendant did not have, on March 14, 1935, nor at any subsequent time, the right to call said bond of plaintiff prior to maturity, and further says that said bond is still unredeemed and in full force and effect.

11. Plaintiff says that defendant had no right to call said bond for redemption except on the payment of ten thousand gold dollars, each containing twenty-five and eight-tenths grains of gold, nine-tenths fine; and that the action of defendant and its Secretary of the Treasury did not constitute a call for redemption nor a redemption of said bond, and the obligations of said bond are still in full force and effect.

12. Plaintiff says that the defendant has publicly announced that it will not pay the First Liberty Loan Bonds in gold dollars of the standard of value existing on the date of their issuance, and has thereby forfeited, while such repudiation continues, any rights or privileges conferred on it [fol. 5] by the terms of said bonds, including the right or privilege to redeem the said bonds before the maturity thereof.

13. Plaintiff says that under authority of the Gold Reserve Act of 1934 the President of the United States, on January 31, 1934, fixed the weight of the gold dollar to be fifteen and five twenty-firsts (15-5/21) grains, nine-tenths (9/10) fine, instead of the former weight of twenty-five and eight-tenths (25-8/10) grains, nine-tenths (9/10) fine. Plaintiff says further that if its said bond is redeemable in legal tender currency, or in gold dollars of the present standard of value, said bond will be of less value to him than if it is redeemed in gold dollars of the standard of value formerly existing, or if it is irredeemable before its maturity date on June 15, 1947.

14. Plaintiff, as such executor, is the sole owner of the bond and coupon referred to and of the claim herein made, and the only person interested therein. There has been no assignment or transfer of this claim, or of any interest therein, and plaintiff is justly entitled to recover the amount herein claimed from the Government of the United States, after allowing all just credits and offsets.

15. No action upon the plaintiff's claim has been had by or before Congress, or, except as aforesaid, any Executive Department of the Government.

16. Plaintiff is, and at all times herein mentioned was a citizen of the United States, has at all times borne true allegiance to the Government of the United States, and has

not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

17. Wherefore plaintiff prays judgment against defendant in the sum of One Hundred Seventy-Five Dollars ($175.00), the face amount of the aforesaid coupon described in paragraph 2 hereof, which sum is now due and owing by [fol. 6] the United States to plaintiff, and no part of which has been paid.

18. The address of plaintiff is Burlington, Iowa; the address of the attorney for plaintiff, Robert A. Taft, is 420 Dixie Terminal Building, Cincinnati, Ohio.

Robert A. Taft, Attorney for James D. Smyth, Executor of Estate of James J. Ransom, Deceased.

Duly sworn to by Robert A. Taft. Jurat omitted in printing.

[fol. 7] SCHEDULE "A" TO PETITION

6670

1932-1947

Act Approved April 24, 1917

Liberty Loan of 1917

The United States of America

For Value Received Promises to pay to the Bearer the sum of

Ten Thousand Dollars

on the 15th day of June, 1947, with interest at the rate of three and one-half percentum per annum payable semi-annually on December 15 and June 15 in each year until the principal hereof shall be payable, upon presentation and surrender of the interest coupons hereto attached as they severally mature. The principal and interest of this bond shall be payable in United States gold coin of the present standard of value, and shall be exempt, both as to principal and interest, from all taxation, except estate or inheritance taxes, im-

posed by authority of the United States, or its possessions, or by any State or local taxing authority. This bond shall not bear the circulation privilege. This bond is one of a series of $2,000,000,000, principal amount of bonds, of an issue of $5,000,000,000 authorized by an Act of Congress entitled "An Act to authorize an issue of bonds to meet expenditures for the national security and defense, and, for the purpose of assisting in the prosecution of the war, to extend credit to foreign governments and for other purposes," approved April 24, 1917. Bonds of different denominations and coupon and registered bonds, of said series, are interchangeable, in equal principal amounts, under regulations of the Treasury Department, and upon payment, if the Secretary of the Treasury shall require, of a charge not exceeding $1 for each new bond issued. All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, or on any semi-annual interest payment date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date, and published thereafter from time [fol. 8] to time during said three months period as the Secretary of the Treasury shall direct. If in any case less than all of the bonds of said series are to be redeemed, the bonds to be redeemed will be determined by lot by such method as may be prescribed by the Secretary of the Treasury. From the date of redemption designated in any such notice interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void. If any subsequent series of bonds (not including United States certificates of indebtedness and other short term obligations) shall be issued by the United States at a higher rate of interest than three and one-half percentum per annum before the termination of the war between the United States and the Imperial German Government, the date of such termination to be fixed by proclamation of the President of the United States, the holder hereof shall have the privilege, at any time within six months after the issue of bonds of such subsequent series, the date of such issue to be fixed by prior public announcement by the Secretary of the Treasury, of converting this bond at par, upon presentation and surrender hereof with all unmatured coupons at the Treasury Department, Washington, or at such other agencies as the

Secretary of the Treasury may hereafter designate for the purpose, and upon adjustment of accrued interest to the date of conversion, into an equal par amount of bonds bearing such higher rate of interest, and substantially identical with the bonds of such subsequent series except that the bonds issued upon such conversion shall be identical with the bonds of the present series as to maturity of principal and interest, and terms of redemption.

6670.

Washington, D. C., June 15, 1917.

W. G. McAdoo, Secretary of the Treasury.

Recorded —— Examined ——.

Houston B. Teehee, Register of the Treasury.

Twenty-four Coupons due December 15, 1935, to June 15, 1947, attached.

[fol. 9] SCHEDULE "B" TO PETITION

Liberty Loan

1917

Department Circular No. 78

Loans and Currency

Treasury Department,
Office of the Secretary,
Washington, May 14, 1917.

The Secretary of the Treasury invites subscriptions at par and accrued interest from the people of the United States of America for $2,000,000,000 of the 15/30 Year 3½ Per Cent Gold Bonds of an issue authorized by Act of Congress approved April 24, 1917.

Description of Bonds

Bearer bonds, with interest coupons attached, will be issued in denominations of $50, $100, $500, and $1,000. Bonds registered as to principal and interest will be issued in denominations of $100, $500, $1,000, $5,000, $10,000, $50,000 and $100,000. Provision will be made for the interchange of bonds of different denominations and of coupon and registered bonds, upon payment, if the Secretary of the

Treasury shall require, of a charge not exceeding $1 for each new bond issued upon such exchange. Transfers of registered bonds and exchanges of registered and coupon bonds and of bonds of different denominations will not be made until October 1, 1917, or such later date as may be designated by the Secretary of the Treasury.

The bonds will be dated June 15, 1917, and will bear interest at the rate of 3½ per centum per annum from that date, payable semi-annually on December 15 and June 15. The bonds will mature June 15, 1947, but the issue may be redeemed on or after June 15, 1932, in whole or in part, at par and accrued interest, on three months published notice, on any interest day; in case of partial redemption the bonds to be redeemed to be determined by lot by such method as may be prescribed by the Secretary of the Treasury. The principal and interest of the bonds will be payable in United [fol. 10] States gold coin of the present standard of value, and the bonds will be exempt, both as to principal and interest, from all taxation, except estate or inheritance taxes, imposed by authority of the United States or its possessions, or by any State or local taxing authorities. The bonds will not bear the circulation privilege, but will be receivable as security for deposits of public money.

If any subsequent series of bonds (not including Treasury certificates of indebtedness and other short-term obligations) shall be issued by the United States at a higher rate of interest than three and one-half per centum per annum before the termination of the war between the United States of America and the Imperial German Government (the date of such termination to be fixed by a proclamation of the President of the United States), the holders of any of the bonds of the present issue shall have the privilege of converting the same, within such period and upon such further terms and conditions covering matters of detail as the Secretary of the Treasury may prescribe, into an equal par amount of bonds bearing such higher rate of interest and substantially identical with the bonds of such new series, except that the bonds issued upon such conversion are to be identical with the bonds of the present series as to maturity of principal and interest and terms of redemption. * * *.

W. G. McAdoo, Secretary of the Treasury.

SCHEDULE "C" TO PETITION

The United States of America

Will pay to bearer One Hundred and Seventy Five Dollars $175.00 for six months' interest due on the fifteenth day of Dec., 1935, on $10,000 3½ per cent bond of Liberty Loan of 1917.

Houston B. Teehee, Register of the Treasury.

6670.

[fol. 11] SCHEDULE "D" TO PETITION

To Holders of First Liberty Loan Bonds of 1932-47, and Others Concerned:

Public notice is hereby given:

1. All outstanding First Liberty Loan bonds of 1932-47 are hereby called for redemption on June 15, 1935. The various issues of First Liberty Loan bonds (all of which are included in this call) are as follows:

First Liberty Loan 3½ percent bonds of 1932-47 (First 3½'s), dated June 15, 1917;

First Liberty Loan Converted 4 percent bonds of 1932-47 (First 4's), dated November 15, 1917;

First Liberty Loan Converted 4¼ percent bonds of 1932-47 (First 4¼'s), dated May 9, 1918; and

First Liberty Loan Second Converted 4¼ percent bonds of 1932-47 (First-Second 4½'s), dated October 24, 1918.

2. Interest on all such outstanding First Liberty Loan bonds will cease on said redemption date, June 15, 1935.

3. Full information regarding the presentation and surrender of First Liberty Loan bonds for redemption under this call will be given in a Treasury Department circular to be issued later.

4. Holders of First Liberty Loan bonds now called for redemption on June 15, 1935, may, in advance of that date, be offered the privilege of exchanging all or any part of their called bonds for other interest-bearing obligations of the United States, in which event public notice will hereafter be given.

Henry Morgenthau, Jr., Secretary of the Treasury.

Treasury Department, Washington, March 14, 1935.

[fol. 12] SCHEDULE "F" TO PETITION

Redemption of First Liberty Loan Bonds

1935

Department Circular No. 535

Public Debt Service

Treasury Department,
Office of the Secretary,
Washington, April 22, 1935.

To Holders of First Liberty Loan Bonds of 1932-47, and Others Concerned:

I. Notice of Call for Redemption Before Maturity

On March 14, 1935, the following public notice of call for redemption was given:

To Holders of First Liberty Loan Bonds of 1932-47, and Others Concerned:

Public notice is hereby given:

1. All outstanding First Liberty Loan bonds of 1932-47 are hereby called for redemption on June 15, 1935. The various issues of First Liberty Loan bonds (all of which are included in this call) are as follows:

First Liberty Loan 3½ percent bonds of 1932-47 (First 3½'s) dated June 15, 1917;

First Liberty Loan Converted 4 percent bonds of 1932-47 (First 4's), dated November 15, 1917;

First Liberty Loan Converted 4¼ percent bonds of 1932-47 (First 4½'s), dated May 9, 1918; and

First Liberty Loan Second Converted 4¼ percent bonds of 1932-47 (First-Second 4¼'s), dated October 24, 1918.

2. Interest on all such outstanding First Liberty Loan bonds will cease on said redemption date, June 15, 1935.

3. Full information regarding the presentation and surrender of First Liberty Loan bonds for redemption under this call will be given in a Treasury Department circular to be issued later.

4. Holders of First Liberty Loan bonds now called for redemption on June 15, 1935, may, in advance of that date, [fol. 13] be offered the privilege of exchanging all or any part of their called bonds for other interest-bearing obligations of the United States, in which event public notice will hereafter be given.

Henry Morgenthau, Jr., Secretary of the Treasury.

Treasury Department, Washington, March 14, 1935.

* * * * * * *

III. Rules and Regulations Governing Redemption of First Liberty Loan Bonds

Pursuant to the call for redemption, as set forth in Section I of this circular, the following rules and regulations are hereby prescribed to govern the presentation and surrender of First Liberty Loan bonds for redemption on June 15, 1935:

1. Payment of called bonds on June 15, 1935.—Holders of any outstanding First Liberty Loan bonds will be entitled to have such bonds redeemed and paid at par on June 15, 1935, with interest in full to that date. After June 15, 1935, interest will not accrue on any First Liberty Loan bonds.

2. Presentation and surrender of coupon bonds.—First Liberty Loan bonds in coupon form should be presented and surrendered to any Federal Reserve bank or branch, or to the Treasurer of the United States, Washington, D. C., for redemption on June 15, 1935. The bonds must be delivered at the expense and risk of holders (see Par. 8 of this section) and should be accompanied by appropriate written advice (see Form P. D. 1435 attached hereto). Checks in payment of principal will be mailed to the address given in the form of advice accompanying the bonds surrendered.

3. Coupons dated June 15, 1935, which become payable on that date, should be detached from any First Liberty Loan bonds before such bonds are presented for redemption on June 15, 1935, and such coupons should be collected in regular course when due. All coupons pertaining to such bonds bearing dates subsequent to June 15, 1935, must be attached to any such bonds when presented for redemption,

provided, however, if any such coupons are missing from bonds so presented for redemption the bonds nevertheless [fol. 14] will be redeemed but the full face amount of any such missing coupons will be deducted from the payment to be made on account of such redemption, and any amounts so deducted will be held in the Treasury to provide for adjustments or refunds on account of such missing coupons as may subsequently be presented.[1]

4. Presentation and surrender of registered bonds.—First Liberty Loan bonds in registered form must be assigned by the registered payees or assigns thereof, or by their duly constituted representatives in accordance with the general regulations of the Treasury Department governing assignments, in the form indicated in the next paragraph hereof, and thereafter should be presented and surrendered to any Federal Reserve bank or branch, or to the Division of Loans and Currency, Treasury Department, Washington, D. C., for redemption on June 15, 1935. The bonds must be delivered at the expense and risk of holders (see Par. 8 of this section) and should be accompanied by appropriate written advice (see Form P. D. 1436 attached hereto). In all cases checks in payment of principal and final interest due will be mailed to the address given in the form of advice accompanying the bonds surrendered.

5. If the registered payee, or an assignee holding under proper assignment from the registered payee, desires that payments of the principal and final installment of interest be made to him, the bonds should be assigned by such payee or assignee, or by a duly constituted representative, to "The Secretary of the Treasury for redemption." If it is desired, for any reason, that payment be made to some other person, without intermediate assignment, the bonds should

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[1] First 4's, First 4¼'s, and First-Second 4¼'s were originally issued in temporary form. The final coupon attached to such temporary bonds became due on December 15, 1919, June 15, 1920, and December 15, 1920, respectively. The holders of any such temporary bonds will receive all past due interest to June 15, 1935, when such bonds are redeemed pursuant to the call. Any coupons now attached to such temporary bonds should be detached and collected in regular course.

be assigned to "The Secretary of the Treasury for redemption for the account of —— ——," inserting the name and address of the person to whom payment is to be made. A representative or fiduciary should not assign for payment to himself individually, unless expressly authorized to do so [fol. 15] by the instrument under which he is acting; he may, however, assign for payment to himself in his representative or fiduciary capacity.

6. Assignment in blank or other assignment having similar effect, will be recognized, but in that event payment will be made to the person surrendering the bond for redemption, since under such assignment the bond becomes in effect payable to bearer. Assignments in blank or assignments having similar effect should be avoided, if possible, in order not to lose the protection afforded by registration.

7. Final interest due on June 15, 1935, on registered bonds of the First Liberty Loan will be paid with the principal in accordance with the assignments on the bonds surrendered. Transfers and exchanges involving registered bonds will be permitted up to the close of business on May 31, 1935, but not after that date.

8. Transportation of bonds.—Bonds presented for redemption under this circular must be delivered to a Federal Reserve bank or branch, or to the Treasury Department, Washington, D. C., at the expense and risk of the holder. Coupon bonds should be forwarded by registered mail insured, or by express prepaid. Registered bonds bearing restricted assignments may be forwarded by registered mail, but registered bonds bearing unrestricted assignments should be forwarded by registered mail insured or by express. Facilities for transportation of bonds by registered mail insured may be arranged between incorporated banks and trust companies and the Federal Reserve banks, and holders may take advantage of such arrangements when available, utilizing such incorporated banks and trust companies as their agents. Incorporated banks and trust companies are not agents of the United States under this circular.

IV. Time of Presentation of Called Bonds for Redemption

1. In order to facilitate the redemption of First Liberty Loan bonds on June 15, 1935, any such bonds should be pre-

sented and surrendered in the manner herein prescribed well in advance of that date, but not before May 15, 1935. Such early presentation by holders will assure prompt payment of principal when due. This is particularly important with respect to registered bonds, for payment cannot be made until registration shall have been discharged at the Treasury Department.

[fol. 16]

2. It will expedite redemption if the bonds are presented to Federal Reserve banks, or branches, and not direct to the Treasury Department.

3. As hereinbefore provided: (1) coupons due June 15, 1935, should be detached from any permanent coupon bonds when such bonds are presented for redemption on that date, such coupons to be collected when due; and (2) final interest due on any registered bonds will be paid with the principal amount.

4. If First Liberty Loan Bonds called for redemption on June 15, 1935, are to be presented for exchange for 2⅞ percent Treasury Bonds of 1955-60, instructions given in Treasury Department Circular No. 536 should be followed; if to be presented for 1⅝ percent Treasury notes of Series A-1940, instructions given in Treasury Department Circular No. 537 should be followed; if to be presented for redemption on June 15, instructions given in this Circular should be followed.

V. General Provisions

1. Any further information which may be desired regarding the redemption of First Liberty Loan bonds under this circular may be obtained from any Federal Reserve bank or branch, or from the Treasury Department, Washington, D. C., where copies of the Treasury Department's regulations governing assignments also may be obtained.

2. As fiscal agents of the United States, Federal Reserve banks are authorized and requested to perform any necessary acts under this circular. The Secretary of the Treasury may at any time, or from time to time prescribe supplemental or amendatory rules and regulations governing the matters covered by this circular, which will be communicated promptly to Federal Reserve banks.

Henry Morgenthau, Jr., Secretary of the Treasury.

[fol. 17] II. General Traverse—Filed February 8, 1936

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

James W. Morris, Assistant Attorney General.

III. Argument and Submission of Case

On January 12, 1937, this case was argued and submitted on merits by Mr. Robert A. Taft, for plaintiff, and by Mr. Harry L. Jones, for defendant.

[fol. 18] IV. **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Littleton, J.**—Filed May 3, 1937

Mr. Robert A. Taft for the plaintiff.

Mr. Harry L. Jones, with whom was Mr. Assistant Attorney General James W. Morris, for the defendant.

Mr. Edward First was on the brief.

Plaintiff as executor is the owner of a First Liberty Loan 3½% gold bond of the United States in the principal amount of $10,000, authorized by an Act of Congress approved April 24, 1917, and issued pursuant to Treasury Department Circular 78 of May 14, 1917. Plaintiff purchased this bond December 28, 1934, paying therefor in dollars $10,362.50 and accrued interest. The Secretary of the Treasury published notice on March 14, 1935, of the call for redemption on June 15, 1935, of the First Liberty Loan bonds, 1932-1947. In this notice of call it was stated that, pursuant to the terms of the bonds, interest would cease on June 15, 1935, the redemption date.

Plaintiff brings this suit to recover one hundred and seventy-five dollars in currency upon an alleged interest obligation for the six months' period June 15 to December 15, 1935, following the date designated for the redemption of the bond. Plaintiff insists that at the time of issuance of

the notice of call for redemption the Government did not intend to pay the bond in gold coin and, having declined [fol. 19] on December 28, 1935, when the bond was presented for payment; to pay therefor $10,000 in gold coin, the bond was and is a continuing obligation of the United States carrying with it a liability upon the interest coupon for the six months' period following June 15, 1935.

Special Findings of Fact

1. Plaintiff is the executor of the estate of James J. Ransom, deceased. December 28, 1934, he purchased a certain bond of the United States in the principal sum of $10,000 known as First Liberty Loan 3½% gold bond of 1932-1947, serial no. 6670, and paid therefor the sum of $10,362.50 and accrued interest. The bond was purchased by plaintiff from the Northern Trust Company, of Chicago, Illinois, and payment therefor was effected by entering a debt against plaintiff's account with that bank in a dollar amount equal to the purchase price. The bond is in evidence as plaintiff's exhibit 2 and is made a part hereof by reference. At the time of the purchase the bond had attached to it an interest coupon covering the period June 15 to December 15, 1935, and, also, interest coupons for subsequent six months' periods to and including June 15, 1947. The coupon for the six months' period ending December 15, 1935, is in evidence as plaintiff's exhibit 3 and is made a part hereof by reference.

The bond held by plaintiff, to which the interest coupon upon which this suit is based was attached, is one of a series of the 15-30 year 3½% gold bonds of an issue authorized by an act of Congress approved April 24, 1917, and issued pursuant to Treasury Department Circular 78 dated May 14, 1917. This Circular 78 is in evidence as exhibit 8 and is made a part hereof by reference. It provided in part as follows:

The bonds will be dated June 15, 1917, and will bear interest at the rate of 3½% per centum per annum from that date, payable semiannually on December 15 and June 15. The bonds will mature June 15, 1947, but the issue may be redeemed on or after June 15, 1932, in whole or in part, at par and accrued interest, on three months' published

notice, on any interest day; in case of partial redemption [fol. 20] the bonds to be redeemed to be determined by lot by such method as may be prescribed by the Secretary of the Treasury. The principal and interest of the bonds will be payable in United States gold coin of the present standard of value, and the bonds will be exempt, both as to principal and interest, from all taxation, except estate or inheritance taxes, imposed by authority of the United States or its possessions, or by any State or local taxing authorities.

2. March 14, 1935, the Secretary of the Treasury issued a public notice that all outstanding First Liberty Loan Bonds of 1932-1947 were called for redemption on June 15, 1935; and on April 22, 1935, the Secretary of the Treasury issued Department Circular no. 535 prescribing rules for redemption of First Liberty Loan Bonds. This Treasury Department Circular, containing the public notice mentioned, is in evidence as exhibit 9 and is made a part hereof by reference.

3. December 28, 1935, plaintiff presented the bond, serial no. 6670, with coupons due on and before June 15, 1935, detached, to the Treasurer of the United States and demanded the redemption of the bond by the payment of 10,000 gold dollars, each containing 25.8 grains of gold, .9 fine. This demand was refused by the Treasurer but the Treasurer of the United States offered to plaintiff payment of the dollar face amount of the principal of the bond in legal tender coin or currency other than gold or gold certificates. Plaintiff refused to accept such legal tender coin or currency and retained the bond. The plaintiff in making his demand for payment of the bond did not accompany it with a "Form of Advice" as required by Treasury Department Circular 535.

Thereafter, on the same day, plaintiff presented to the Treasurer of the United States the interest coupon for the six months' period June 15 to December 15, 1935, and demanded payment thereof in the sum of $175, either in gold coin or legal tender currency. The Treasurer refused payment of the coupon on the ground that the bond to which it was attached had been called for redemption on June 15, 1935.

[fol. 21] 4. The total monetary silver of the United States on February 28, March 31, May 31, and June 30, 1935, was as follows:

Items	Feb. 28, 1935	Mar. 31, 1935	May 31, 1935	June 30, 1935
Per circulation statement:				
Standard silver dollars	$545,642,265	$545,642,265	$545,642,265	$545,642,265
Subsidiary (fractional) silver coin	309,546,227	308,778,560	313,397,788	313,423,778
Silver bullion securing certificates	221,963,409	263,337,146	306,999,772	313,308,863
Per mint and assay office accounts:				
Recoinage silver bullion (from melted coin)...	9,829,012	10,385,962	6,023,010	5,789,809
Other silver bullion, valued at $1.29 per ounce.	294,502,187	287,123,271	297,799,301	305,747,263
Total	1,381,483,100	1,415,267,204	1,466,862,136	1,483,911,978

The amount of monetary silver of the United States during the period extending from February 28 to June 30, 1935, was constantly increasing and was not at any time during such period less than $1,381,483,100.

5. Plaintiff did not on December 28, 1935, or at any other time hold a federal license to acquire, hold, or dispose of gold coin or gold bullion, and was not engaged in any business in which the use of gold coin or gold bullion was necessary. On December 28, 1935, and thereafter plaintiff owed no obligation and incurred no expenses which could not have been liquidated in legal tender currency other than gold coin. Had the plaintiff on December 28, 1935, when he presented the bond to the Treasurer of the United States for payment, received ten thousand dollars in gold coin it was his purpose and intention to send the gold coin to the Northern Trust Company as a routine deposit in the plaintiff's dollar account with that bank for which plaintiff would have received a credit of $10,000 in such account. Had plaintiff accepted the tendered proceeds of the redemption of the bond, he would have purchased therewith some other investment. On December 28, 1935, there was no other investment which plaintiff might have made in the United States with the $10,000 in gold coin that he could

not equally as well have made with $10,000 in legal tender currency.

6. On June 15, 1935, and thereafter the First Liberty Loan 3½% gold bonds of 1932-1947, dated June 15, 1917, [fol. 22] and designated in the notice of call for redemption issued by the Secretary of the Treasury on March 14, 1935, and embodied in Treasury Department Circular No. 535 of April 22, 1935, as called for redemption on June 15, 1935, were not listed on any exchange but were occasionally available in the open market and selling at not in excess of their dollar face amount and interest accrued at the date of redemption as fixed in said notice of call for redemption.

Had the First Liberty Loan 3½% bonds of 1932-47 contained no redemption provision, such bonds would have had a market value on December 28, 1934, and thereafter, of approximately 110 plus accrued interest.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is not entitled to recover and the petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion

Littleton, Judge, delivered the opinion of the court:

The $10,000 First Liberty Loan bond, to which was attached the six-months' interest coupon upon which this suit is based, provided in part as follows:

The United States of America for value received promises to pay to the bearer the sum of Ten Thousand Dollars on the 15th day of June 1947, with interest at the rate of three and one-half per centum per annum payable semi-annually on December 15 and June 15 in each year until the principal hereof shall be payable; upon presentation and surrender of the interest coupons hereto attached as they severally mature. The principal and interest of this bond shall be payable in United States gold coin of the present

standard of value * * *. All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, or on any semiannual interest payment date or dates [fol. 23] at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date and published thereafter from time to time during said three months' period as the Secretary of the Treasury shall direct. * * *. From the date of redemption designated in any such notice interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void.

The interest coupon upon which this suit is based provided as follows:

The United States of America will pay to bearer One Hundred and Seventy-Five Dollars ($175.00) for six months' interest due on the fifteenth day of Dec. 1935, on $10,000 3½% bond of Liberty Loan of 1917.

It will be seen from the above that the sole question is whether under the terms of the bond and the call for redemption thereof there was a continuing obligation on the part of the Government to pay interest subsequent to the redemption date. This question was presented and decided by this court November 9, 1936, in Dixie Terminal Company v. *United* States, 83 C. Cls. 656. Since that decision the Circuit Court of Appeals for the 4th Circuit in Machen v. United States, 87 Fed. (2d) 594, held that the owner of a First Liberty Loan 3½% gold bond was entitled to recover interest subsequent to the date on which the bonds were called for redemption by reason of the Government's refusal to pay the bonds in gold coin. Substantially the same reasons given by the court for its decision in the Machen case were urged by plaintiff and considered by this court in Dixie Terminal Company v. United States, supra. We are not persuaded by the opinion of the Circuit Court of Appeals that the reasoning and conclusion of this court in the Dixie Terminal Company case were erroneous. In that case we held that "by the agreement of the parties the obligation of the defendant to pay interest on the bond ceased upon the issuance of notice of call and passage of time to the date designated for redemption in such notice";

that the contract "required only the giving of notice of call for redemption, which was admittedly done", and that the court could not read into the bond a condition not justified [fol. 24] by the language of the contract and the well-established rule that the United States is not liable for interest, as such, without its express consent.

Plaintiff contends that the call for redemption was void for the reason that when the call was issued the Government did not intend to pay the bond in gold and that its refusal to redeem the bond, when presented, by the payment of $10,000 in gold coin, or the equivalent of the value of such gold coin, caused the interest provisions of the statute, the Treasury Department circular, and the provisions of the bond to continue to the maturity date of the bond, or until it was paid in gold coin, as an enforceable obligation of the United States. While the failure of the United States strictly to comply with the contract in respect to payment of the principal of the bond in gold coin may have given rise to a cause of action with respect to the principal, such action of the Government did not change or enlarge the specific terms of the agreement with respect to interest subsequent to June 15, 1935. Moreover, plaintiff suffered no damage by reason of the refusal of the Government to make payment in gold coin. At the time plaintiff made demand he was not engaged or authorized to engage in any business in which gold coin or gold bullion was necessary for its operation and held no license to receive or hold gold coin or gold bullion. In Perry v. United States, 294 U. S. 330, the plaintiff was offered, as plaintiff herein was tendered, legal tender currency of the face amount of the Liberty bond which had been called for redemption and, in that case, the court, in speaking of the legal consequences of this tender, said:

Plaintiff demands the "equivalent" in currency of the gold coin promised. But "equivalent" cannot mean more than the amount of money which the promised gold coin would be worth to the bondholder for the purposes for which it could legally be used. That equivalence or worth could not properly be ascertained save in the light of the domestic and restricted market which the Congress had lawfully established. In the domestic transactions to which the plaintiff was limited, in the absence of special license, determination of the value of the gold coin would necessarily

[fol. 25] have regard to its use as legal tender and as a medium of exchange under a single monetary system with an established parity of all currency and coins.

The plaintiff here has not shown or attempted to show any circumstances justifying a finding that for any reason the currency tendered was not the equivalent of gold. We think therefore that he cannot successfully urge as a basis for holding the United States liable for interest subsequent to June 15, 1935, that the tendered amount of coin was not a redemption of the bond in accordance with its terms. It seems clear that in view of the lawful regulations enacted by Congress with reference to the use, receipt, or holding of gold coin or gold bullion plaintiff would have obtained no real benefit from the tender of gold coin. In Nortz v. United States, 294 U. S. 317, 328, the court said:

> The asserted basis of plaintiff's claim for actual damages is that, by the terms of the gold certificates, he was entitled, on January 17, 1934, to receive gold coin. It is plain that he cannot claim any better position than that in which he would have been placed had the gold coin then been paid to him. But, in that event, he would have been required, under the applicable legislation and orders, forthwith to deliver the gold coin to the Treasury. * * * Had plaintiff received gold coin for his certificates, he would not have been able, in view of the legislative inhibition, to export it or deal in it. * * * It cannot be said that, in receiving the currency on that basis, he sustained any actual loss.

For these and other reasons stated in Dixie Terminal Company v. United States, supra, the court will not imply a condition in the bond to the effect that unless gold coin only is paid, interest subsequent to the redemption date shall continue. The continuation of an interest obligation, which the contract between the parties provides shall cease upon the happening of a certain event, must rest upon more than a technical breach.

The only point urged by plaintiff in this case which was not briefed by plaintiff in the Dixie Terminal Company case is that the call for redemption of the First Liberty Loan bond was void because neither of the conditions enu- [fol. 26] merated in (R. S. 3693) section 731 of Title 31 of the United States Code existed. Counsel for plaintiff

in the Dixie Terminal Company case referred to this section in oral argument but we did not discuss the section in the opinion for the reason we were of opinion that it had no important bearing upon the question presented. The section relied upon was enacted March 18, 1869, as follows:

> The faith of the United States is solemnly pledged to the payment in coin or its equivalent * * * of all the interest-bearing obligations of the United States, except in cases where the law authorizing the issue of any such obligations has expressly provided that the same may be paid in lawful money or other currency than gold and silver. But none of the interest-bearing obligations not already due shall be redeemed or paid before maturity, unless at such time United States notes are convertible into coin at the option of the holder, or unless at such time bonds of the United States bearing a lower rate of interest than the bonds to be redeemed can be sold at par in coin.

The right of the Government to call the First Liberty Loan bonds for redemption prior to maturity is governed solely by the First Liberty Loan Act of April 24, 1917, 40 Stat. 35, as amended, pursuant to which the bond held by plaintiff was issued. That act contained the provision that "The bonds herein authorized shall be in such form and subject to such terms and conditions of issue, conversion, redemption, maturities, payment, and rate and time of payment of interest, not exceeding three and one-half per centum per annum, as the Secretary of the Treasury may prescribe."

Treasury Department Circular 78, under which the First Liberty Loan bonds were issued, provided that "The bonds will mature June 15, 1947, but the issue may be redeemed on or after June 15, 1932, in whole or in part, at par and accrued interest, on three months' published notice, on any interest day; * * *." And the Liberty Bond provided that "All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, or on any semi-annual interest payment date or dates, at the face value thereof and interest accrued at the date of redemption, on [fol. 27] notice published at least three months prior to

the redemption date and published thereafter from time to time during said three months' period as the Secretary of the Treasury shall direct."

We think it is clear therefore that the only terms and conditions governing the redemption of the First Liberty Loan bonds prior to maturity are those contained in the statute of 1917 authorizing their issue, the circular, and the bond. These terms and conditions have been fully complied with. The Act of March 18, 1869 (Title 31, U. S. Code, section 731), applied solely to the redemption of bonds outstanding at the time of its enactment when the dual monetary system of the United States existed. That dual system ceased to exist upon the resumption of specie payments in 1879.

Prior to the enactment of the Act of 1869 the Government issued bonds which did not expressly state the medium of payment. It had also issued United States notes (greenbacks) which were circulating at a great discount in comparison with gold and silver, also then in circulation. In the first sentence of the Act of 1869, which is here material only for historical background, the United States pledged itself (1) to pay its United States notes in coin or its equivalent, and (2) to pay its interest-bearing obligations in coin or its equivalent; unless the law authorizing issue expressly provided for payment in some currency other than gold or silver. The first part of the second sentence of the Act of 1869 quoted above, in order to protect the holders of United States notes who were not to be paid coin or its equivalent, provided that the interest-bearing obligations of the Government were not to be redeemed before maturity unless at such time the holders of United States notes could convert their notes into coin; as was stated by Robert C. Schenk, one of the House Managers in charge of the bill (Congressional Globe, March 3, 1869, p. 1879), "That is, the bonds of the United States are not to be paid before maturity, while the noteholders are to be kept without their redemption, unless the noteholders are able at the same time to convert their notes into coin." The last part of the second sentence, which provided "or unless at such time bonds of the United States bearing a lower rate of interest than the bonds to be re- [fol. 28] deemed can be sold at par in coin", was enacted in order not to make the restriction on redemption of interest-bearing obligations too burdensome and to enable

the United States to refund its outstanding obligations at a lower rate of interest should the credit of the Government warrant it, even though there had been no resumption of specie payments on United States notes.

From the above we think it is clear that the only Government bonds to which the act applied were those then outstanding, and that the Act of 1869 became obsolete and ceased to have significance when the Government resumed specie payments on its United States notes and maintained all coins and currencies at a parity of value. Moreover the word "coin" in the Act of 1869 clearly referred to silver coin as well as gold coin. At the time the First Liberty Loan bond involved in the case at bar was called for redemption and at the date set for redemption any holder of a United States note could have presented the same to the Treasury of the United States, or any fiscal agency thereof, and received in exchange therefor silver coin.

Plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

Whaley, Judge; Williams, Judge; Green, Judge; and Booth, Chief Justice, concur.

[fol. 29] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 3rd day of May, A. D., 1937, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is not entitled to recover.

It is therefore adjudged and ordered that the plaintiff's petition be and the same is hereby dismissed.

[fol. 30] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 41,500. Court of Claims. Term No. 960. James D. Smyth, Executor of the Estate of James J. Ransom, Deceased, petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed May 7, 1937. Term No. 960, O. T., 1936.

[fol. 31] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 1, 1937

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S
FILED
MAY 7 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. [redacted] 42

JAMES D. SMYTH, EXECUTOR OF THE ESTATE OF JAMES J. RANSOM, DECEASED,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

ROBERT A. TAFT,
Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 960

JAMES D. SMYTH, EXECUTOR OF THE ESTATE OF JAMES J. RANSOM, DECEASED,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Your petitioner, James D. Smyth, as Executor of the Estate of James J. Ransom, deceased, prays that a writ of certiorari be issued to the Court of Claims of the United States to review the judgment of that court in the above entitled action, and respectfully shows to this Honorable Court:

Judgment Below.

Judgment of the Court of Claims was entered on May 3, 1937.

Statement of the Case.

Suit was instituted in the Court of Claims by the petitioner as the owner, holder for value, and bearer of a First

Liberty Loan Bond in the principal amount of $10,000.00, to recover $175.00, either in gold coin or legal tender currency on the interest coupon due December 15, 1935, attached to such bond. By its terms, the bond of the petitioner could be redeemed and paid at the pleasure of the United States on or after June 15, 1932, on any interest date or dates. By the express terms of the bond the principal and interest thereof were payable in United States gold coin of the standard of value as of the date of issue. On March 14, 1935, the Secretary of the Treasury purported to issue a notice of call for redemption of all First Liberty Loan Bonds on June 15, 1935, confirming such purported call in Treasury Department Circular Number 535 dated April 22, 1935.

On December 28, 1935, petitioner duly presented his bond to the respondent and demanded payment in gold dollars of the standard of value of the date of issuance, but the respondent refused to redeem the bond except by the payment of $10,000.00 in legal tender currency. The offer of the Government was refused by the petitioner, who thereafter on the same day presented the interest coupon due December 15, 1935, attached to said bond, and demanded payment of the amount thereof, $175.00, either in gold coin or legal tender currency. The respondent refused payment on the ground that the bond had been called for redemption on June 15, 1935. Upon such refusal by the respondent to pay the December 15, 1935, interest coupon, the petitioner filed suit on December 31, 1935, in the Court of Claims to recover in legal tender currency (not in gold coin) the amount of such interest coupon.

Question Presented.

Whether interest ceases to run on a bond of the United States, payable in gold coin of the standard of value in effect June 15, 1917, when the Secretary of the Treasury

on March 14, 1935, issues a purported call for redemption on June 15, 1935, but refuses to pay the bond except in legal tender currency.

Reasons for the Allowance of the Writ.

(1) *The Court of Claims decided the question involved in this case in a way which does not give proper effect to the decision of this Court in the case of Perry* v. *United States,* 294 U. S. 330.

In that case this Court held unconstitutional the Joint Resolution of June 5, 1933, which attempted to provide that obligations of the United States, payable in gold coin, might be discharged by the payment of currency. It is true that the Court held that the bondholder failed to prove any damages from failure to pay gold—in short, that the remedy sought was defective although the legal right was unquestioned. In this case the bondholder does not seek payment in gold, but insists upon his right to receive interest on his bond until its maturity, unless the Government complies with its legal obligation to pay gold.

(2) *The decision of the Court of Claims is squarely in conflict with the decision of the Fourth Circuit Court of Appeals in the case of Machen* v. *United States,* 87 F. (2d) 594, *decided January* 15, 1937.

In the Machen case, Judge Parker, writing the opinion for the Court of Appeals, rejected the reasoning and conclusion of the Court of Claims in the case of *The Dixie Terminal Company* v. *United States,* 83 C. Cls. 656, involving an interest coupon on a Fourth Liberty Loan Bond. Judge Parker said, 87 F. (2d) 594 at 596:

> "The argument of the government and the decision of the Court of Claims in *Dixie Terminal Co.* v. *United States* — Ct. Cls. —, to which our attention is called, proceed upon the theory that the provision of

> the bond providing for notice, upon which interest is to cease and coupons subsequently maturing are to become void, is to be construed as though it were independent of the provision for redemption which it follows, i.e. that a notice is sufficient which states that the bonds will be redeemed on the named date, even though it does not say or mean to say that they will be redeemed in accordance with their terms. We think that the position is unsound and that, under the decision in the *Morgan case, supra* (*Morgan* v. *United States*, 113 U. S. 476), the provision as to notice must be construed as a part of the provision for redemption."

The Court of Claims in deciding the *Smyth* case recognized this conflict with the Circuit Court of Appeals for the Fourth Circuit. In the course of the opinion, Judge Littleton states (R. 20):

> "This question was presented and decided by this court November 9, 1936, in *Dixie Terminal Company* v. *United States*, 83 C. Cls. 656. Since that decision the Circuit Court of Appeals for the Fourth Circuit in *Machen* v. *United States*, 87 F. (2d) 594, held that the owner of a First Liberty Loan 3½% gold bond was entitled to recover interest subsequent to the date on which the bonds were called for redemption by reason of the Government's refusal to pay the bonds in gold coin. Substantially the same reasons given by the court for its decision in the *Machen case* were urged by plaintiff and considered by this court in *Dixie Terminal Company* v. *United States, supra*. We are not persuaded by the opinion of the Circuit Court of Appeals that the reasoning and conclusion of this court in the *Dixie Terminal Company case* were erroneous."

(3) *The question raised by this case is of great public and general interest.*

After the passage of the Joint Resolution of June 5, 1933, and before and after the decision of this Court in the Perry case, the Secretary of the Treasury has attempted to

call all gold-clause bonds which could be called in advance of their maturity, amounting to more than eight billion dollars. The list includes:

Fourth Liberty Loan Bonds called for April 15, 1934	$1,875,000,000
Fourth Liberty Loan Bonds called for October 15, 1934	1,250,000,000
Fourth Liberty Loan Bonds called for April 15, 1935	1,870,000,000
Fourth Liberty Loan Bonds called for October 15, 1935	1,250,000,000
First Liberty Loan Bonds called for June 15, 1935	1,929,915,000
2% Consols of 1930 called for July 1, 1935	599,724,000
2% Panama Canal Bonds called for August 1, 1935	74,901,000
Total	$8,849,540,000

Other such gold-clause bonds are outstanding, not callable at this time, but callable in the future, an attempt to call which may be made. The question involves directly the credit of the United States and the sanctity of its contracts. It involves a construction of various statutes of the United States relating to the calling of bonds which have never been construed. The question raised herein has never been passed upon by this Court; its character demands that it should be.

Conclusion.

For the reasons herein set forth, it is respectfully submitted that this petition should be granted.

ROBERT A. TAFT,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinion Below.

One opinion was delivered by the Court of Claims. It was written by Judge Littleton and filed May 3, 1937. It appears at page 19 of the Record, but is not yet reported.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229 (43 Stat. 939, 28 U. S. C. A. § 288).

The judgment of the Court of Claims was entered on May 3, 1937. The petition herein was filed on May 7, 1937.

Chronological Statement of Documents, Statutes, Proclamations and Circulars Involved.

Petitioner is the owner and holder for value of a United States First Liberty Loan Bond reading as follows:

1932-1947 6670.
Act Approved April 24, 1917.

LIBERTY LOAN OF 1917.

THE UNITED STATES OF AMERICA.

For value Received Promises to pay to the Bearer the sum of

Ten Thousand Dollars

on the 15th day of June, 1947, with interest at the rate of three and one-half per centum per annum payable semi-annually on December 15 and June 15 in each year until the principal hereof shall be payable, upon presentation and surrender of the interest coupons hereto attached as they severally mature. The principal and interest of this bond shall be payable in United States

gold coin of the present standard of value, and shall be exempt, both as to principal and interest, from all taxation, except estate or inheritance taxes, imposed by authority of the United States, or its possessions, or by any State or local taxing authority. This bond shall not bear the circulation privilege. This bond is one of a series of $2,000,000,000, principal amount of bonds, of an issue of $5,000,000,000 authorized by an Act of Congress entitled "An Act to authorize an issue of bonds to meet expenditures for the national security and defense, and, for the purpose of assisting in the prosecution of the war, to extend credit to foreign governments and for other purposes," approved April 24, 1917. Bonds of different denominations and coupon and registered bonds, of said series, are interchangeable, in equal principal amounts, under regulations of the Treasury Department, and upon payment, if the Secretary of the Treasury shall require, of a charge not exceeding $1 for each new bond issued. All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, on any semi-annual interest payment date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date, and published thereafter from time to time during said three months period as the Secretary of the Treasury shall direct. If in any case less than all of the bonds of said series are to be redeemed, the bonds to be redeemed will be determined by lot by such method as may be prescribed by the Secretary of the Treasury. From the date of redemption designated in any such notice interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void. If any subsequent series of bonds (not including United States certificates of indebtedness and other short term obligations) shall be issued by the United States at a higher rate of interest than three and one-half per centum per annum before the termination of the war

between the United States and the Imperial German Government, the date of such termination to be fixed by proclamation of the President of the United States, the holder hereof shall have the privilege, at any time within six months after the issue of bonds of such subsequent series, the date of such issue to be fixed by prior public announcement by the Secretary of the Treasury, of converting this bond at par, upon presentation and surrender hereof with all unmatured coupons at the Treasury Department, Washington, or at such other agencies as the Secretary of the Treasury may hereafter designate for the purpose, and upon adjustment of accrued interest to the date of conversion, into an equal par amount of bonds bearing such higher rate of interest, and substantially identical with the bonds of such subsequent series except that the bonds issued upon such conversion shall be identical with the bonds of the present series as to maturity of principal and interest, and terms of redemption.

6670.

Washington, D. C., June 15, 1917.

W. G. McAdoo,
Secretary of the Treasury.

Recorded —— Examined ——.

Houston B. Teehee,
Register of the Treasury."

The interest coupon attached to petitioner's bond, payable December 15, 1935, reads as follows:

"The United States of America

Will pay to bearer One Hundred and Seventy-Five Dollars $175.00 for six months' interest due on the fifteenth day of Dec., 1935, on $10,000 3½ per cent bond of Liberty Loan of 1917.

Houston B. Teehee,
6670. *Register of the Treasury.*"

The relevant portion of Treasury Department Circular Number 78, under which petitioner's bond was issued, reads:

1917
Department Circular No. 78.

"TREASURY DEPARTMENT,
Office of the Secretary,
Washington, May 14, 1917.

Loans and Currency.

The Secretary of the Treasury invites subscriptions at par and accrued interest from the people of the United States of America for $2,000,000,000 of the 15/30 Year 3½ Per Cent Gold Bonds of an issue authorized by Act of Congress approved April 24, 1917. * * *

* * * The bonds will be dated June 15, 1917, and will bear interest at the rate of 3½ per centum per annum from that date, payable semi-annually on December 15 and June 15. The bonds will mature June 15, 1947, but the issue may be redeemed on or after June 15, 1932, in whole or in part, at par and accrued interest, on three months published notice, on any interest day; in case of partial redemption the bonds to be redeemed to be determined by lot by such method as may be prescribed by the Secretary of the Treasury. The principal and interest of the bonds will be payable in United States gold coin of the present standard of value, and the bonds will be exempt, both as to principal and interest, from all taxation, except estate or inheritance taxes, imposed by authority of the United States or its possessions, or by any State or local taxing authorities. * * *

W. G. MCADOO,
Secretary of the Treasury."

First Liberty Loan Bonds were issued under the Act of April 24, 1917 (Ch. 4, sec. 1, 40 Stat. 35), the pertinent provisions of which read as follows:

> "The Secretary of the Treasury, with the approval of the President, is hereby authorized to borrow, from time to time, on the credit of the United States for the purposes of this Act, and to meet expenditures authorized for the national security and defense and other public purposes authorized by law not exceeding in the aggregate $5,000,000,000, exclusive of the sums authorized by section four of this Act, and to issue therefor bonds of the United States.
>
> "The bonds herein authorized shall be in such form and subject to such terms and conditions of issue, conversion, redemption, maturities, payment, and rate and time of payment of interest, not exceeding three and one-half per centum per annum, as the Secretary of the Treasury may prescribe. The principal and interest thereof shall be payable in United States gold coin of the present standard of value and shall be exempt, both as to principal and interest, from all taxation, except estate or inheritance taxes, imposed by authority of the United States, or its possessions, or by any State or local taxing authority; but such bonds shall not bear the circulation privilege."

At the time of passage of the Act of April 24, 1917, and at the time the First Liberty Loan Bonds were issued, there was in effect the Act of March 14, 1900 (31 Stat. at L. 45, c. 41, § 1), defining the gold content of the dollar, and reading as follows:

> "The dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity."

Under the authority of the Emergency Banking Act, passed on March 9, 1933, the President on April 5, 1933, issued Executive Order No. 6102, prohibiting the hoarding of gold, and requiring all persons to deliver all gold coin, gold bullion, and gold certificates owned or acquired by them to the Government, and accept legal tender currency therefor.

On May 12, 1933, Congress passed, and the President approved, the Agricultural Adjustment Act of May 12, 1933, authorizing the President, among other things, to reduce the gold content of the dollar.

On June 5, 1933, the Congress of the United States adopted a Joint Resolution (48 Stat. at L. 113, c. 48, U. S. C., Title 31, § 463), which reads as follows:

"Provision for payment of obligations in gold prohibited; uniformity in value of coins and currencies.

(a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this section, the term 'obligation' means an obligation (including every obligation of and

to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve Banks and national banking associations."

On August 28, 1933, the President promulgated Executive Order No. 6260, requiring every person owning gold coin, gold bullion, or gold certificates to make a return to the Secretary of the Treasury, and prohibiting the acquisition of any such gold without license and the holding of any such gold without license after thirty days from the date of the order, under penalty of fine and imprisonment.

On January 30, 1934, the Gold Reserve Act of 1934 (Act of January 30, 1934, 48 Stat. at L. 340, c. 6) became law. Section 5 of such Act reads:

"No gold shall hereafter be coined, and no gold coin shall hereafter be paid out or delivered by the United States: Provided, however, That coinage may continue to be executed by the mints of the United States for foreign countries in accordance with the Act of January 29, 1874 (U. S. C. Title 31, Sec. 367). All gold coin of the United States shall be withdrawn from circulation, and, together with all other gold owned by the United States, shall be formed into bars of such weights and degrees of fineness as the Secretary of the Treasury may direct."

On January 31, 1934, the President issued a Proclamation (48 Stat. at L. Part 2, page 1730), the relevant provisions of which are:

"Now, therefore, be it known that I, Franklin D. Roosevelt, President of the United States, by virtue of the authority vested in me by section 43, title III of said act of May 12, 1933, as amended; and by virtue of all other authority vested in me, do hereby proclaim, order, direct, declare, and fix the weight of the gold

dollar to be 15-5/21 grains nine-tenths fine, from and after the date and hour of this proclamation. The weight of the silver dollar is not altered or affected in any manner by reason of this proclamation."

On March 14, 1935, the Secretary of the Treasury purported to issue a notice of call for redemption of the petitioner's bond. This notice was later set forth in Treasury Department Circular Number 535, the pertinent part of which reads as follows:

"REDEMPTION OF FIRST LIBERTY LOAN BONDS

1935,
Department Circular No. 535.

TREASURY DEPARTMENT,
Office of the Secretary,
Washington, April 22, 1935.

Public Debt Service.

To Holders of First Liberty Loan Bonds of 1932-47, and Others Concerned:

I. Notice of Call for Redemption Before Maturity.

On March 14, 1935, the following public notice of call for redemption was given:

To Holders of First Liberty Loan Bonds of 1932-47, and Others Concerned:

Public notice is hereby given:

1. All outstanding First Liberty Loan Bonds of 1932-47 are hereby called for redemption on June 15, 1935. The various issues of First Liberty Loan bonds (all of which are included in this call) are as follows:

First Liberty Loan 3½ percent bonds of 1932-47 (First 3½'s) dated June 15, 1917;

First Liberty Loan Converted 4 percent bonds of 1932-47 (First 4's), dated November 15, 1917;

First Liberty Loan Converted 4¼ percent bonds of 1932-47 (First 4½'s), dated May 9, 1918; and

First Liberty Loan Second Converted 4¼ percent bonds of 1932-47 (First-Second 4¼'s) dated October 24, 1918.

2. Interest on all such outstanding First Liberty Loan bonds will cease on said redemption date, June 15, 1935.

HENRY MORGENTHAU, JR.,
Secretary of the Treasury.

Treasury Department, Washington, March 14, 1935."

On August 27, 1935, Congress adopted a Joint Resolution withdrawing the consent of the United States to the assertion against it of any right, privilege or power "upon any gold-clause securities of the United States, or for interest thereon." Since this action was taken after the decision of this Court that the Government's obligation to pay gold was valid, this Joint Resolution is clearly a reaffirmation of the Government's refusal to pay gold, and of its intention to redeem the called bonds in currency only. However, the Resolution expressly provides that the section shall not apply "to any proceeding referred to in this section in which no claim is made for payment or credit in an amount in excess of the face or nominal value in dollars of the securities, coins or currencies of the United States involved in such proceeding." Since this and similar suits only claim the face or nominal value in dollars of the coupon sued upon, the Resolution does not apply in any way to this kind of a suit.

Petitioner's bond was presented for payment on December 28, 1935, and payment demanded in gold coin in accordance with its terms. The respondent refused to pay gold on the ground that the Treasury was forbidden to pay out gold; and refused to redeem the bond except in legal tender currency. Thereupon, petitioner presented the interest coupon

due December 15, 1935, on which this suit is brought, and demanded payment either in gold coin or in legal tender currency. Payment was refused on the ground that interest had ceased to run on June 15, 1935.

ARGUMENT.

Summary.

1. THE PROVISIONS OF THE BOND AND CIRCULAR WITH RESPECT TO PAYMENT IN GOLD COIN ARE VALID UNDER THE PERRY DECISION, IN SPITE OF THE LEGISLATION ADOPTED BY CONGRESS.

2. THE PURPORTED CALL ON MARCH 14, 1935, WAS VOID, BECAUSE IT WAS A CALL FOR PAYMENT IN CURRENCY, AND NOT IN ACCORD WITH THE TERMS OF THE BOND.

3. REGARDLESS OF THE VALIDITY OF THE PURPORTED CALL, THE RUNNING OF INTEREST ON PETITIONER'S BOND DID NOT CEASE ON JUNE 15, 1935, BECAUSE THE UNITED STATES WAS NOT READY AND WILLING AT THAT TIME, OR AT ANY TIME, TO REDEEM THE PETITIONER'S BOND IN ACCORDANCE WITH ITS TERMS.

4. THE PURPORTED CALL ISSUED ON MARCH 14, 1935, WAS VOID, BECAUSE THE SECRETARY OF THE TREASURY HAD NO AUTHORITY TO ISSUE A CALL WITHOUT FURTHER ACTION BY CONGRESS.

5. THE PURPORTED CALL ISSUED ON MARCH 14, 1935, WAS VOID BECAUSE FORBIDDEN BY SECTION 731 OF TITLE 31 OF THE UNITED STATES CODE (ACT OF MARCH 18, 1869, 16, STAT. 1).

1. The provisions of the bond and circular with respect to payment in gold coin are valid under the Perry decision, in spite of the legislation adopted by Congress.

In the case of *Perry* v. *United States*, 294 U. S. 330, this Court held that the Joint Resolution of June 5, 1933, insofar as it attempted to override the obligation to pay in gold coin created by the Fourth Liberty Loan Bonds, went beyond the

congressional power. Chief Justice Hughes, delivering the opinion of the Court, said:

> "The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power *vital to the* Government—upon which in an extremity its way life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy these obligations. The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and despite infirmities of procedure, remains binding upon the conscience of the sovereign."

In view of this decision there can be no doubt that the Government was obligated to pay the petitioner's bond in gold coin of the former standard of value. The lack of remedy and failure of proof found to exist in the *Perry* case is not material here, because the petitioner is not suing for gold, and is not seeking damages for failure to pay gold, but is merely claiming the right to interest until maturity, or until the bond is called and paid in accordance with the admitted obligation of the Government. Although the Government is legally and morally obligated to pay this bond in gold, it is now trying to redeem the bond, and to pay that bond immediately in a depreciated currency. If the Government had to pay the bond in gold, it would never have called the bond. It is only because it desires to take advantage of its repudiation, and because of the difficulty of the bondholder securing any remedy against that repudiation, that the effort is made to pay in advance of maturity. It may be

that at maturity, if the Government maintains its position, and no further change is made in the monetary policy or the value of gold, the petitioner will have to accept currency in payment of the bond, but in the meantime we submit that it may collect interest in legal tender currency, unless the Government is willing to redeem the bond in accordance with its terms.

2. The purported call on March 14, 1935, was void, because it was a call for payment in currency, and not in accord with the terms of the bond.

The purported call for redemption issued by the Secretary of the Treasury on March 14, 1935, did not state in what medium the bonds would be redeemed or paid on June 15, 1935. But under the legislation in effect on March 14, 1935, there can be no question that the purported call was one for redemption in currency and not in gold. A series of legislative acts, presidential proclamations, and executive orders had been climaxed by the adoption of the Gold Reserve Act of 1934, which expressly prohibited the Secretary of the Treasury from paying out gold. As on March 14, 1935, it was illegal for the Secretary of the Treasury to pay out gold, it was certainly illegal for him to call any bonds for payment in gold. The Secretary of the Treasury, of course, was entirely subject to the will of Congress. If he had any authority to call bonds in gold, it existed under the statutes of Congress, and any such authority was revoked and ceased to exist upon adoption of the Gold Reserve Act of 1934. The call, therefore, can only be construed as a call for payment in currency.

The Government was obliged to pay its bonds in gold under the holding of this Court in the *Perry* case. A call for payment in currency was just as void and ineffectual to stop the running of interest as a call for payment of the

bond by paying fifty per cent of its face amount, or a notice of redemption in real estate or corporate stocks or silver bullion. This call must certainly be interpreted in the light of the existing statutes, and so interpreted it was a direct notice from the Government that it desired and intended to redeem the bonds in legal-tender currency and not in accordance with their terms.

This is no imaginary argument. When the call was issued, everybody in the United States knew exactly what was intended. Congress had repeatedly declared its intention of abandoning gold and paying in currency; it had gone further and forbidden the paying out of gold. No official of the Government, no holder of any bond, had the slightest idea that the notice of call meant anything except a call to pay in currency. The Secretary of the Treasury would never have called the bonds if he had had the slightest expectation of having to pay in gold.

Our position is supported by the opinion of the Circuit Court of Appeals for the Fourth Circuit in the case of *Machen* v. *United States of America*, 87 F. (2d) 594, at 597. Judge Parker said:

> "It would hardly be contended that a notice to the effect that the Government would redeem the bonds at 59 cents on the dollar would be a sufficient notice under the bond to stop the running of interest and avoid the subsequently maturing coupons; but it will be seen that this is precisely what the notice as published means when the acts of Congress and the presidential proclamation affecting the currency are read into it, and when it is remembered that Congress is without power to abrogate the gold clause as contained in obligations of the Government. * * *
>
> "It follows that, because of the legislation and the presidential proclamation to which we have referred, the Secretary of the Treasury was without power, both at the time of the publication of the notice and at the time fixed for redemption, either to pay gold on the

gold clause bonds or to pay in paper money the value of the gold which they promised. He was consequently without power under the law to redeem these gold clause bonds at their face value; and the notice of redemption which he issued must be construed in the light of this lack of power."

3. Regardless of the validity of the purported call, the running of interest on petitioner's bond did not cease on June 15, 1935, because the United States was not ready and willing at that time, or at any time, to redeem the petitioner's bond in accordance with its terms.

The Government relies on that sentence in the bond which states: "From the date of redemption designated in any such notice, interest on bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void." But surely this does not mean that interest shall cease on the mere issue of a call without intention or ability to redeem the bonds on the call date. Analyzing the situation, it would appear that interest on called bonds ceases (1) if proper notice of redemption is given, and (2) if on presentation the bond is paid in accordance with its terms, or would be so paid if presented. It can hardly be contended that the call itself is the only condition upon which interest ceases. If a corporation calls bonds, and then fails to have the money on hand to redeem the bonds in accordance with the call, the holder of such bonds surely has the option of retaining his bonds until maturity and collecting interest. It is possible that he also has the option of availing himself of the terms of the call, and suing for immediate payment, on the ground that the debtor has estopped itself from denying the validity of the call. The necessary and logical conclusion from the Government's position is that under the terms of the bond the Government could call a bond without the slightest intention of paying it,

and thereby cause interest to stop running. In the *Perry* case, this Court insisted on the sacredness of the Government's obligations. The construction of the obligation insisted on by the Government would enable it to cancel its sacred obligations.

In the case of *Sterling* v. *H. F. Watson Company,* 241 Pa. 105, 88 Atl. 297 (1913), the defendant attempted to call its preferred stock by the payment of its par value and accrued dividends, which it was entitled to do, but attempted to deduct from the accrued dividends the par value of a twenty-five per cent stock dividend which had been distributed eight years before. The stockholder sued to restrain the company from stopping dividends after the call date, and from refusing to transfer the stockholder's stock. The Supreme Court of Pennsylvania held that the twenty-five per cent stock dividend could not be considered under the terms of the preferred stock redemption clause, and granted the stockholder's petition, requiring the company to treat the plaintiff as a stockholder by transferring his stock, and to continue the payment of semi-annual dividends until a call was issued strictly in accordance with the terms of the redemption clause.

In *Corbett, Executrix,* v. *McClintic-Marshall Corporation,* 17 Delaware Chancery 165 (1930), the directors of the company exercised their charter right to redeem complainant's preferred stock, but complainant contended that the price at which they proposed to redeem was not the correct price. On demurrer, the Chancellor held that the petition stated a proper cause of action, but that the complainant was not entitled to insist on cash redemption at the higher price which she claimed, because this was within the discretion of the board of directors, a discretion which they had not exercised. The court held, however, that she was entitled, if she proved her case, to retain the status of a preferred stockholder. The court said, on page 171:

> "In view of the fact that the bill shows that the defendant has notified the complainant in substance that she is to be denied the status of a preferred stockholder in the future, the nature of the case, if the complainant be right in her claims touching the alleged illegality of the proposed redemption, requires a decree that though she cannot on the facts alleged enforce a redemption in accordance with her specific prayers, yet the defendant is bound to treat her as a preferred stockholder until proper redemption of her stock has been effected."

It is well settled that holders of bonds without a call provision cannot be made to accept payment in advance of maturity; *Chicago, etc. Railroad Co.* v. *Pyne,* 30 Fed. 86; *Missouri Railroad Co.* v. *Union Trust Co.,* 156 N. Y. 592, 51 N. E. 309. A statute providing that payment must be accepted before maturity is unconstitutional; *Randolph* v. *Middleton,* 26 N. J. Equity 543. Surely an effective call cannot be issued unless it is followed by a tender of the money either to a trustee or paying agent in the case of a private corporation, or direct to the bondholder in the case of the United States. As the Court of Appeals of New York said, in the case of *Missouri Railroad Co.* v. *Union Trust Company:*

> "They (the bondholders) have the right to have their bonds redeemed only according to the contract, and unless they are so redeemed, to hold them and draw interest upon them until the day of payment shall arrive."

We respectfully call the court's attention to the English case of *Gordillo* v. *Weguelin,* 5 Chancery Division 287 (1877), in which the question of cessation of interest was discussed. In that case a mortgage indenture provided that the debtor would pay interest and five per cent of the principal sum semi-annually. Provision was made that a certain amount of bonds should be drawn for redemption on May

first and November first of each year, to be redeemable on the following June first and December first, respectively. The indenture then provided: "but no interest shall be payable on any drawn bond after the date fixed for its redemption." The debtor having defaulted, the trustees took possession after certain bonds had been drawn and called, but before they had been redeemed. The question arose whether the holders of bonds drawn for redemption, but whose bonds the trustee was unable to pay, were entitled equally with holders of undrawn bonds to receive interest. The court held, despite the words quoted above, that interest continued to accrue on the drawn bonds, because they had not been paid on the date fixed for redemption, and that such interest had the same status under the terms of a deed of trust as interest on the undrawn bonds. Lord Justice James said:

> "I am of opinion that upon the whole deed what was intended was that interest should run until the bond was paid, or until it was payable according to the terms of the deed, that is *de facto* payable out of funds provided for that purpose. When the bonds were in truth payable, not payable in the sense of the money being recoverable in an action at law, or anything of that kind, but payable by reason of the fund being provided for the purpose of paying them, either in the hands of the contractors or received by the trustees, then the interest would cease, and until it was so payable in truth and in fact, as well as in legal right of action, the interest runs."

While the petitioner's bond provided that from the date of redemption designated in any notice of call, interest on the called bonds should cease, yet the bond also contained the expressed provision that "all or any of the bonds of the series of which this is one, may be redeemed *and paid* (italics ours) * * *." Certainly this provision for redemption and payment would not have been inserted in the

bond if it were the intention of the parties that interest should cease upon a date set for redemption, regardless of the willingness and ability of the United States to redeem. It is undoubtedly true that when the bond was drafted no one considered the possibility of repudiation by the United States and that consequently no provision was made in the bond to cover such a contingency, for as stated by Mr. Justice Strong in *United States* v. *Sherman*, 98 U. S. 565:

> "Delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes."

But as is pointed out in 50 *Harvard Law Review*, 986, the interpretation of the Circuit Court of Appeals in the *Machen* case is more in accord with the intent of the parties. The Liberty Bonds drafted by officials of the Government should be construed most strongly against it. No one purchasing a Liberty Bond considered the possibility of the United States repudiating its obligations.

4. The purported call issued on March 14, 1935, was void, because the Secretary of the Treasury had no authority to issue a call without further action by Congress.

As pointed out on page 10, the First Liberty Loan Act authorized the Secretary of the Treasury to prescribe the terms of redemption of bonds issued under such act. Under such broad authority, the Secretary of the Treasury might have prescribed any one of several methods for issuing a notice of call. He actually did prescribe that the First Liberty Loan Bonds should be redeemable at the pleasure of the United States. In the case of *Morgan* v. *United States*, 113 U. S. 476, Mr. Justice Matthews, writing the opinion for this Court, referred to the provision as to calling bonds there involved, and stated:

> "The pleasure of the Government to redeem them or any part of them, of course, could only be declared by

law. Provision to this effect was made by the Act of July 14, 1870."

We respectfully submit that the conclusion of this Court in that case was correct. There is no more reason why the pleasure of the Secretary of the Treasury should be the pleasure of the United States than the pleasure of the President, or of the Vice-President, or any other officer of the Government. The redemption of bonds is a major financial transaction, requiring the consideration of Congress. The Secretary of the Treasury Department, between October 12, 1933, and August 1, 1935, determined to call nearly nine billion dollars in bonds payable in gold, at a time when the terms of the bonds could not be complied with. The policy followed involved a repudiation by the Government of its solemn obligations declared to be such by this Court in the case of *Perry* v. *United States*, 294 U. S. 330. Certainly no one would maintain that an individual, holding an appointed office in a government founded on the theory of popular representation and control, would have the right to obligate the country for nine billion dollars. We submit that he has no greater right to exercise the pleasure of the United States in repudiating obligations incurred on the authorization of Congress.

5. The purported call issued on March 14, 1935, was void because forbidden by Section 731 of Title 31 of the United States Code (Act of March 18, 1869, 16 Stat. 1).

This Section 731 provides:

> "None of the interest-bearing obligations not already due shall be redeemed or paid before maturity, unless at such time United States notes are convertible into coin at the option of the holder, or unless at such time bonds of the United States bearing a lower rate of interest than the bonds to be redeemed can be sold at par in coin."

The reason for the original passage of this law was obviously to prevent the Government from doing just what it is attempting to do now—paying off its obligations to its bondholders in a depreciated currency. United States notes, or "green-backs," were, of course, at a considerable discount from gold in 1869, and were not redeemable in gold or silver coin at that time. In order to protect the bondholders, Congress provided that none of the interest-bearing obligations should be redeemed or paid before maturity as long as United States notes were not convertible into coin at the option of the holder. Neither on March 4, 1933, nor at any subsequent date have United States notes been convertible into coin at the option of the holder. The Government, and not the holder, has the option, and it may pay out currency of any kind for any United States notes presented.

The proviso at the end of Section 731 was intended to permit the redemption of bonds if the Government is in a position to sell its bonds and receive gold for them, even though they bear a lower rate of interest. If the bonds bearing a lower rate of interest can only be sold for currency, then no call can be made. It is obvious that Government Bonds, when this call was issued in 1935, could not be sold for gold coin. There was no gold coin except in minor hoards, and if anyone could lawfully have obtained gold, he would not have paid gold for United States Bonds, whether on their face they were payable in gold or in currency. It is suggested that United States Bonds might have been sold for silver coin. Obviously the Government has never sold bonds and required payment in silver coin and it is not a practical operation. There is not enough silver coin in the country to pay for an issue as large as the First Liberty Loan issue called. The silver coin not in the Treasury is required for ordinary change throughout the country. Furthermore, the silver coin has a purely fictitious value in excess of the value of the silver contained in such coins,

and in effect is nothing but subsidiary currency. In 1869 it might have been possible for the Government to sell gold bonds and require payment in gold coin, thus obtaining the gold coin necessary to redeem the prior issue, but since the validity of the gold clause is in doubt, such bonds cannot be sold today.

We respectfully submit that Section 731 was intended to prevent exactly what the Government is now trying to do.

Conclusion.

We submit that the decision of the Court of Claims denies "the validity of the public debt of the United States, authorized by law," and makes a mockery of the power of Congress "to borrow money on the credit of the United States."

Respectfully submitted,

ROBERT A. TAFT,
Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. [redacted] 42

JAMES D. SMYTH, EXECUTOR OF THE ESTATE OF JAMES J. RANSOM, DECEASED,

Petitioner,

vs.

THE UNITED STATES.

MEMORANDUM FOR THE PETITIONER.

The petitioner has heretofore filed with its petition in this cause, a brief in which it has set forth the reasons why it believes that a writ of certiorari should be granted by this Honorable Court. The United States has now filed a waiver of its right to file a reply to the petition, and in the case of *The Dixie Terminal Company, Petitioner,* against *The United States,* No. 961 (in which the undersigned is also counsel for the petitioner), has filed a memorandum joining in petitioner's request that a writ of certiorari be issued to the Court of Claims of the United States.

The memorandum of the Government, in the case in which The Dixie Terminal Company is petitioner, gives as a reason for the granting of the writ, that the decision of the Court of Claims in that case is in conflict with the deci-

sion of the Circuit Court of Appeals for the Fourth Circuit in the case of *Machen* against *The United States*, 87 F. (2d) 594. The petitioner respectfully points out to this Honorable Court that while the Circuit Court of Appeals for the Fourth Circuit disapproved of the reasoning of the Court of Claims in the *Dixie Terminal* case, the actual conflict in decisions is between that of the Circuit Court of Appeals for the Fourth Circuit in the *Machen* case and that of the Court of Claims in the instant case. These two cases involve the question of the right of a bondholder to recover interest on an interest coupon attached to a so-called First Liberty Loan Bond; the *Dixie Terminal* case involves the right of a bondholder to recover on an interest coupon attached to a so-called Fourth Liberty Loan Bond. The wording of the statutes under which the bonds were issued, of the Treasury Department's circulars pursuant to which subscriptions to the bonds were made, and of the bonds themselves, are different in the case of First Liberty Loan Bonds and Fourth Liberty Loan Bonds.

The petitioner respectfully submits to this Honorable Court that because of the difference in the manner of expressing the undertakings of the Government, as set forth in the bonds of the two series involved in this case and in the *Dixie Terminal* case, writs of certiorari should be issued to the Court of Claims of the United States to review the judgment of that Court in the instant case as well as in Case No. 961, *The Dixie Terminal Company, Petitioner*, against *The United States*.

Respectfully submitted,

ROBERT A. TAFT,
Attorney for Petitioner.

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BRIEF FOR PETITIONER

Supreme Court of the United States

OCTOBER TERM, 1937

No. 42

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Roessler Brothers, Inc., Printers and Publishers, 528 Walnut Street

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Supreme Court of the United States

October Term, 1937

No. 42

JAMES D. SMYTH, EXECUTOR OF THE ESTATE OF JAMES J. RANSOM, DECEASED, PETITIONER,

vs.

THE UNITED STATES.

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Claims was written by Judge Littleton and filed May 3, 1937. It appears at page 19 of the record, and will be reported in volume 85 of the Court of Claims Report, not yet published.

JURISDICTION

The jurisdiction of this Court is invoked under Paragraph (b) of Section 3 of the Act of February 13, 1925, c. 229 (43 Stat. 939, 28 U.S.CA., Sec. 288). A petition for a writ of certiorari to the Court of Claims was filed in this Court on May 7, 1937, and granted on June 1, 1937.

STATEMENT OF THE CASE, INCLUDING CHRONOLOGICAL STATEMENT OF DOCUMENTS, STATUTES, PROCLAMATIONS AND CIRCULARS INVOLVED

Petitioner is the owner and holder for value of a United States First Liberty Loan Bond the material parts of which read as follows (Rec. 5):

1932-1947 6670.

Act Approved April 24, 1917.

LIBERTY LOAN OF 1917.

THE UNITED STATES OF AMERICA

For Value Received Promises to pay to the Bearer the sum of
Ten Thousand Dollars

on the 15th day of June, 1947, with interest at the rate of three and one-half per centum per annum payable semi-annually on December 15 and June 15 in each year until the principal hereof shall be payable, upon presentation and surrender of the interest coupons hereto attached as they severally mature. **The principal and interest of this bond shall be payable in United States gold coin of the present standard of value,** and shall be exempt, both as to principal and interest, from all taxation, except estate or inheritance taxes, imposed by authority of the United States, or its possessions, or by any State or local taxing authority. . . . . All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, on any semi-annual interest payment date or dates, at the face value thereof and interest accrued at the date of redemption, and notice published at least three months prior to the redemption date, and published thereafter from time to time during said three months period as the Secretary of the Treasury shall direct. If in any case less than all of the bonds of said series are to be redeemed, the bonds to be redeemed will be determined by lot by such method as may be prescribed by the Secretary of the Treasury. From the date of redemption designated in any such notice interest on the

bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void. . . .

6670.

Washington, D. C., June 15, 1917.

W. G. McAdoo,
Secretary of the Treasury.

Recorded —— Examined ——.

Houston B. Teehee,
Register of the Treasury."

The interest coupon attached to petitioner's bond, payable December 15, 1935, reads as follows (R. 9):

"The United States of America

Will pay to bearer One Hundred and Seventy-Five Dollars ($175.00) for six months' interest due on the fifteenth day of Dec., 1935, on $10,000 3½ per cent bond of Liberty Loan of 1917.

Houston B. Teehee,
6670. *Register of the Treasury.*"

The relevant portion of Treasury Department Circular Number 78, under which petitioner's bond was issued, reads (R. 7):

1917

Department Circular No. 78.

"Treasury Department,
Office of the Secretary,
Washington, May 14, 1917.

Loans and Currency.

The Secretary of the Treasury invites subscriptions at par and accrued interest from the people of the United States of America for $2,000,000,000 of the 15/30 Year 3½ Per Cent Gold Bonds of an issue authorized by Act of Congress approved April 24, 1917. * * * * * * The bonds will be dated June 15, 1917, and will bear interest at the rate of 3½ per centum per annum from that date, payable semi-annually on December 15 and June 15. The bonds will mature June 15, 1947, but the issue may be redeemed on or after June 15, 1932, in whole or in part, at par and accrued interest, on three months published notice, on any interest day; in case of partial redemption the bonds to be redeemed to be determined by lot by such method as may be pre-

scribed by the Secretary of the Treasury. **The principal and interest of the bonds will be payable in United States gold coin of the present standard of value,** a[nd] the bonds will be exempt, both as to principal and interest, from all taxation, except estate or inheritance taxes, imp[o]sed by authority of the United States or its possessions, or by any State or local taxing authorities. * * *

W. G. McAdoo,
Secretary of the Treasury."

First Liberty Loan Bonds were issued under the Act of April 24, 1917 (Ch. 4, sec. 1, 40 Stat. 35), the pertinent provisions of which read as follows:

"The Secretary of the Treasury, with the approval of the President, is hereby authorized to borrow, from time to time, on the credit of the United States for the purposes of this Act, and to meet expenditures authorized for the national security and defense and other public purposes authorized by law not exceeding in the aggregate $5,000,000,000, exclusive of the sums authorized by section four of this Act, and to issue therefor bonds of the United States.

"The bonds *herein authorized shall be in such form* and subject to such terms and conditions of issue, conversion, redemption, maturities, payment, and rate and time of payment of interest, not exceeding three and one-half per centum *per annum*, as the Secretary of the Treasury may prescribe. **The principal and interest thereof shall be payable in United States gold coin of the present standard of value** *and shall be exempt*, both as to principal and interest, from all taxation, except estate or inheritance taxes, imposed by authority of the United States, *or its possessions*, or by any State or local taxing authority; but such bonds shall not bear the circulation privilege."

At the time of passage of the Act of April 24, 1917, and at the time the first Liberty Loan Bonds were issued, there was in effect the Act of March 14, 1900 (31 Stat. at L. 45, c. 41, § 1), defining the gold content of the dollar, and reading as follows:

"The dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity of value

with this standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity."

Under the authority of the Emergency Banking Act, passed on March 9, 1933, the President on April 5, 1933, issued Executive Order No. 6102, prohibiting the hoarding of gold, and requiring all persons to deliver all gold coin, gold bullion, and gold certificates owned or acquired by them to the Government, and accept legal tender currency therefor.

On May 12, 1933, Congress passed, and the President approved, the Agricultural Adjustment Act of May 12, 1933, authorizing the President, among other things, to reduce the gold content of the dollar.

On June 5, 1933, the Congress of the United States adopted a Joint Resolution (48 Stat. at L. 113, c. 48, U. S. C., Title 31, § 463), which reads as follows:

> (a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.
>
> (b) As used in this section, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve Banks and national banking associations."

On August 28, 1933, the President promulgated Executive Order No. 6260, requiring every person owning gold coin, gold bullion, or gold certificates to make a return to the Secretary of the Treasury, and prohibiting the acquisition of any such

gold without license and the holding of any such gold without license after thirty days from the date of the order, under penalty of fine and imprisonment.

On January 30, 1934, the Gold Reserve Act of 1934 (Act of January 30, 1934, 48 Stat. at L. 340, c. 6) became law. Section 5 of such Act reads:

> "**No gold shall hereafter be coined, and no gold coin shall hereafter be paid out or delivered by the United States:** Provided, however, That coinage may continue to be executed by the mints of the United States for foreign countries in accordance with the Act of January 29, 1874 (U. S. C. Title 31, Sec. 367). All gold coin of the United States shall be withdrawn from circulation, and, together with all other gold owned by the United States, shall be formed into bars of such weights and degrees of fineness as the Secretary of the Treasury may direct."

On January 31, 1934, the President issued a Proclamation (48 Stat. at L. Part 2, page 1730), the relevant provisions of which are:

> "Now, therefore, be it known that I, Franklin D. Roosevelt, President of the United States, by virtue of the authority vested in me by section 43, title III of said act of May 12, 1933, as amended, and by virtue of all other authority vested in me, do hereby proclaim, order, direct, declare, and fix the weight of the gold dollar to be fifteen and five twenty-firsts grains, nine-tenths fine, from and after the date and hour of this proclamation. The weight of the silver dollar is not altered or affected in any manner by reason of this proclamation."

On February 18, 1935, this Court decided the case of John M. Perry v. The United States, in which it held that the Joint Resolution of June 5, 1933, insofar as it attempted to override the obligation created by the Fourth Liberty Loan Bond is involved, went beyond the congressional power, but that the plaintiff in that case had failed to prove any damages.

On March 14, 1935, the Secretary of the Treasury issued a purported notice of call for redemption of the petitioner's bond. This notice was later sent forth in Treasury Department Circular Number 535, the pertinent part of which reads as follows (R. 9):

"REDEMPTION OF FIRST LIBERTY LOAN BONDS

1935

Department Circular No. 535.

TREASURY DEPARTMENT,
Office of the Secretary,
Washington, April 22, 1935.

Public Debt Service.

To Holders of First Liberty Loan Bonds of 1932-47, and Others Concerned:

I. Notice of Call for Redemption Before Maturity.

On March 14, 1935, the following public notice of call for redemption was given:

To Holders of First Liberty Loan Bonds of 1932-47, and Others Concerned:

Public notice is hereby given:

1. All outstanding First Liberty Loan Bonds of 1932-47 are hereby called for redemption on June 15, 1935. The various issues of First Liberty Loan bonds (all of which are included in this call) are as follows:

First Liberty Loan 3½ percent bonds of 1932-47 (First 3½'s) dated June 15, 1917;

First Liberty Loan Converted 4 percent bonds of 1932-47 (First 4's), dated November 15, 1917;

First Liberty Loan Converted 4¼ percent bonds of 1932-47 (First 4¼'s), dated May 9, 1918; and

First Liberty Loan Second Converted 4¼ percent bonds of 1932-47 (First-Second 4¼'s) dated October 24, 1918.

2. Interest on all such outstanding First Liberty Loan bonds will cease on said redemption date, June 15, 1935.

HENRY MORGENTHAU, JR.,
Secretary of the Treasury.

Treasury Department, Washington, March 14, 1935."

On August 27, 1935, Congress adopted a Joint Resolution withdrawing the consent of the United States to the assertion against it of any right, privilege or power "upon any gold-clause securities of the United States, or for interest thereon." Since this action was taken after the decision of this Court that the Government's obligation to pay gold was valid, this Joint Resolution is clearly a reaffirmation of the Government's

refusal to pay gold, and of its intention to redeem the called bonds in currency only. However, the Resolution expressly provides that the section shall not apply "to any proceeding referred to in this section in which no claim is made for payment or credit in an amount in excess of the face or nominal value in dollars of the securities, coins or currencies of the United States involved in such proceeding." Since this and similar suits only claim the face or nominal value in dollars of the coupon sued upon, the Resolution does not apply in any way to this kind of a suit.

Petitioner's bond was presented for payment on December 28, 1935, and payment demanded in gold coin in accordance with its terms. (R. 17). The respondent refused to pay gold on the ground that the Treasury was forbidden to pay out gold; and refused to redeem the bond except in legal tender currency. Thereupon, petitioner presented the interest coupon due December 15, 1935, on which this suit is brought, and demanded payment either in gold coin or in legal tender currency. Payment was refused on the ground that interest *had ceased to run on* June 15, 1935.

ARGUMENT

INTRODUCTION AND SUMMARY

The question involved in this case is whether interest ceased on a First Liberty Loan Bond on June 15, 1935, because of the Secretary of the Treasury's action in purporting to issue a call for redemption. The petitioner is not seeking payment of his interest in gold coin, but is merely seeking to hold his *bond until maturity*, or redemption in gold, whichever occurs first, and collect interest in currency in the interim.

While the present suit only involves one $10,000 First Liberty Loan Bond, the issue presented is very *much* the same as that presented in a total of more than eight and one-half billion dollars of bonds called by the Government since the repudiation of its obligation to pay gold, as found by Judge Littleton in his Finding of Facts in the Dixie Terminal case (October Term, 1937, No. 43). Since the decision of the United States Supreme Court that the Government's obligation to pay its

bonds in gold is a binding obligation, the Government has called every gold-clause bond which could be called, and has attempted to pay it in currency. The list includes:

Fourth Liberty Loan Bonds called for April 15, 1934	$1,875,000,000
Fourth Liberty Loan Bonds called for October 15, 1934	1,250,000,000
Fourth Liberty Loan Bonds called for April 15, 1935	1,870,000,000
Fourth Liberty Loan Bonds called for October 15, 1935	1,250,000,000
First Liberty Loan Bonds called for June 15, 1935	1,929,915,000
2% Consols of 1930 called for July 1, 1935	599,724,000
2% Panama Canal Bonds called for Aug. 1, 1935	74,901,000
Total	$8,849,540,000

Most of these bonds have already been redeemed or exchanged for bonds bearing a lower rate of interest, and there is now no remedy for the former holders, but those owners, like the plaintiff, who still hold their bonds should be able to draw interest at the 3½ per cent rate until maturity.

The question presented is whether the Government of the United States, after the Supreme Court of the United States has held that its obligation to pay its bonds in gold coin is a valid and binding obligation, however defective the remedy may be, can deliberately exercise the privilege given to it of calling its bonds in order that it may pay them in currency instead of in gold coin. It is the contention of the petitioner that interest on First Liberty Loan Bonds did not cease on June 15, 1935, for the following reasons:

1. THE PROVISIONS OF THE BOND AND CIRCULAR WITH RESPECT TO PAYMENT IN GOLD COIN ARE VALID UNDER THE PERRY DECISION, IN SPITE OF THE LEGISLATION ADOPTED BY CONGRESS.

2. THE ATTEMPT TO REDEEM WAS VOID AB INITIO, BECAUSE THE NOTICE PUBLISHED WAS NOT A NOTICE OF INTENTION TO REDEEM IN GOLD IN ACCORDANCE WITH THE TERMS OF THE BOND.

3. EVEN IF THE PURPORTED CALL WERE CONSIDERED VALID, THE RUNNING OF INTEREST ON PETITIONER'S BOND DID NOT

CEASE ON JUNE 15, 1935, BECAUSE THE UNITED STATES WAS NOT READY AND WILLING AT THAT TIME, OR AT ANY TIME, TO REDEEM THE PETITIONER'S BOND IN ACCORDANCE WITH ITS TERMS.

4. THE PURPORTED CALL ISSUED ON MARCH 14, 1935, WAS VOID, BECAUSE THE SECRETARY OF THE TREASURY HAD NO AUTHORITY TO ISSUE A CALL WITHOUT FURTHER ACTION BY CONGRESS.

5. THE PURPORTED CALL ISSUED ON MARCH 14, 1935, WAS VOID, BECAUSE FORBIDDEN BY SECTION 731 OF TITLE 31 OF THE UNITED STATES CODE (ACT OF MARCH 18, 1869, 16, STAT. 1).

1. THE PROVISIONS OF THE BOND AND CIRCULAR WITH RESPECT TO PAYMENT IN GOLD COIN ARE VALID UNDER THE PERRY DECISION, IN SPITE OF THE LEGISLATION ADOPTED BY CONGRESS.

In the case of *John M. Perry v. United States*, 294 U. S. 330, the plaintiff brought suit as the owner of a registered Fourth Liberty Loan 4¼% Bond, similar to that sued on in this case.

The Court of Claims certified to the Supreme Court of the United States the question whether the claimant was entitled to receive from the United States an amount in legal-tender currency in excess of the face amount of the bond. The Government contended that in view of the Joint Resolution of June 5, 1933, which purported to nullify all provisions for payment in gold, the Government could discharge the obligation by the payment of currency. The Supreme Court of the United States held that the Joint Resolution of June 5, 1933, insofar as it attempted to override the obligation created by the Fourth Liberty Loan Bond sued upon, went beyond the congressional power. Chief Justice Hughes, delivering the opinion of the Court, said:

> "In attempted justification of the Joint Resolution in relation to the outstanding bonds of the United States, the Government argues that 'earlier Congresses could not vadidly restrict the 73rd Congress from exercising its constitutional powers to regulate the value of money, borrow money, or regulate foreign and interstate com-

merce'; and, from this premise, the Government seems to deduce the proposition that when, with adequate authority, the Government borrows money and pledges the credit of the United States, it is free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient. The Government's contention thus raises a question of far greater importance than the particular claim of the plaintiff. On that reasoning, if the terms of the Government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to the amount to be paid may also be repudiated. The contention necessarily imports that the Congress can disregard the obligations of the Government at its discretion and that, when the Government borrows money, the credit of the United States is an illusory pledge.

We do not so read the Constitution. There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers. In authorizing the Congress to borrow money, the Constitution empowers the Congress to fix the amount to be borrowed and the terms of payment. By virtue of the power to borrow money 'on the credit of the United States,' the Congress is authorized to pledge that credit as an assurance of payment as stipulated,—as the highest assurance the Government can give, its plighted faith. To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government.

* * * * * * *

The argument in favor of the Joint Resolution, as applied to Government bonds, is in substance that the Government cannot by contract restrict the exercise of a sovereign power. But the right to make binding obligations is a competence attaching to sovereignty.

* * * * * *

The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the Government,—

upon which in an extremity its very life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations. The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and, despite infirmities of procedure, remains binding upon the conscience of the sovereign."

In view of this decision, there can be no doubt that the Government was obligated to pay the petitioner's bond in gold coin of the former standard of value, and that this obligation remains binding upon the conscience of the sovereign.

The Lack of Remedy is not Material, Because the Plaintiff is not Suing for Gold. The plaintiff in the Perry case failed to recover because he attempted to obtain arbitrarily an amount of currency in excess of the face amount of his bond, without alleging or proving any direct damages to himself resulting from the Government's repudiation of its obligation. But in this case the plaintiff is not seeking a remedy; it is the Government which is attempting to exercise a privilege given to it by the terms of the bond, at the same time that it is repudiating its obligation contained in that bond. The petitioner contends that he may hold his bond until maturity, at which time the gold standard may be restored, or the value of the gold dollar increased. If not, the petitioner will no doubt be obliged to accept currency in payment of the bond. Although the Government is legally and morally obligated to pay this bond in gold, it is now trying to exercise the power given to it in the bond to redeem the bond, and to pay that bond immediately in a depreciated currency. If the Government had to pay the bond in gold, it would never have called the bond. The plaintiff is seeking to recover only the currency value of his coupon; he is not seeking damages for failure to pay gold; he is merely insisting that the Government cannot repudiate its obligations in one breath, and avail itself of privileges conferred on it at the same time.

2. THE ATTEMPT TO REDEEM WAS VOID AB INITIO, BECAUSE THE NOTICE PUBLISHED WAS NOT A NOTICE OF INTENTION TO REDEEM IN GOLD IN ACCORDANCE WITH THE TERMS OF THE BOND.

The First Liberty Loan Bonds provide:

> "All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, or on any semi-annual interest date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date, and published thereafter from time to time during the said three months' period as the Secretary of the Treasury shall direct."

It is clear that "notice published at least three months prior to the redemption date" is a condition precedent to the right to redeem. What kind of a notice does this refer to? It must obviously be a notice to pay the bond in accordance with its terms. A notice to pay the bond in real estate, or by transferring municipal bonds or other securities, would be exactly as good as no notice at all. Under the circumstances existing on March 14, 1932, and the legislation then in effect, this notice was not a notice to redeem in gold in accordance with the terms of the bond, but a notice to redeem in currency.

On March 14, 1935, when the notice to redeem First Liberty Loan Bonds was issued in Treasury Department Circular No. 535, there was in full effect the Gold Reserve Act of 1934, which provided: "No gold shall hereafter be coined and no gold coin shall hereafter be paid out or delivered by the United States." We respectfully submit, in the first place, that the Secretary of the Treasury, while that statute was in effect, could not issue a notice of intention to pay the bond in accordance with its terms. The Secretary of the Treasury is an administrative officer, subject in all respects to the legislation of Congress. Except for enactment by Congress, the right to redeem "at the pleasure of the United States" does not mean the right to redeem at the pleasure of the Secretary of the Treasury. As far as he has any power to issue a notice, it exists by congressional enactment. Since Congress prohibited him from paying out gold, there can certainly be no authority

implied in any way for him to give a notice of intention to redeem in gold.

In the second place, no matter what the power of the Secretary of the Treasury, the notice issued was not a notice to redeem in gold. It was silent as to the medium of payment, but in view of the legislation then in effect, it was clearly a statement of intention to redeem in currency and not in gold. We have already referred to the *Joint Resolution of June* 5, 1933, and the Gold Reserve Act of 1934. We have referred to the various other acts of Congress and the President nationalizing gold and prohibiting the holding of gold by private persons. The notice issued must be construed in the light of these enactments as a notice to redeem in currency. It must be presumed that the Secretary of the Treasury, an administrative officer, was merely carrying out the intention of Congress.

This is no imaginary argument. When the call was issued, everybody in the United States knew exactly what was intended. Congress had repeatedly declared its intention of abandoning gold and paying in currency. No official of the Government, no holder of any bond, had the slightest idea that the notice of call meant anything except a call to pay in currency. The Secretary of the Treasury would never have called the bonds if he had had the slightest expectation of having to pay in gold.

The President had also devalued the dollar, and established, with the approval of Congress, a dollar having a different standard of value from that prescribed in the bond, so that even if gold could have been paid out, it would have been a different amount of gold than that called for by the terms of the bond.

A call for payment in currency is clearly not in accord with the provisions of the bond and the circular under which the bond was issued, which provisions this Court has held to be valid. It seems manifest, therefore, that the so-called "call" of March 14, 1935, may be treated by the bondholder as completely void, and his bond will continue to draw interest until maturity, or until after a bona fide call for redemption in accordance with the terms of the bond.

In its attempt to support its position, the defendant is forced to fall back on the claim that the intent of the United States in its character as sovereign to pay the bonds in currency must be completely severed from its intent as contractor to pay the bonds in gold. The Government in the lower court relied on cases which hold that interference with the performance of contracts between the Government and private persons, arising from acts of the Government *in its* capacity as sovereign, does not result in claims for damages against the Government. The holding of these cases is very different from the present claim that the Government may do an act, or issue a call, and claim that it means one thing in its capacity as contractor and an entirely opposite thing in its capacity as sovereign. The position of the Government seems to be that it can say, "In my capacity as contractor, I now call these bonds for payment in gold and intend to pay for them in gold; but in my capacity as sovereign, I prohibit myself from paying gold and intend to pay the bonds in currency." Such a distinction cannot be made. The call was either a call for payment in gold or it was *not* a call for payment in gold, and we submit that with the laws then in effect it could not be and was not a call for payment in gold.

The whole argument that the Government can distinguish itself as contractor and sovereign in the matter of Government Bonds was destroyed once and for all in the Perry case. The Government's contention in that case was that in its capacity as sovereign it could effectually destroy its obligation as contractor on its own bonds. It was a strong argument, which prevailed with one of the Justices of this Court, and it drew support from the very cases which the Government attempts to rely on here. But the Court found that the Government's own obligations on its public debt were assumed in the exercise of its sovereign powers, and that they could not be changed or abrogated through the exercise of any other sovereign power.

It is suggested by the Government that because the Supreme Court of the United States, in Perry v. The United States, treated the call as valid, and considered Perry's claim for pay-

ment of the principal, therefore that case is an authority to establish the validity of the Government's call. In the first place, this question was not considered by this Court at any point. Both the Government and the plaintiff were willing to proceed on the assumption that the bond had been called, so that the point was not brought to the attention of the Court. In the second place, it is entirely possible that the bondholder may have an option to treat the call as valid if he so desires. If a private corporation issued a call, and then failed to have funds to pay the bonds, the bondholder certainly could hold his bonds until maturity, but he should also in reason have an option to treat the bonds as called and insist upon their payment. Such a corporation would be estopped to assert the invalidity of its own call.

The Government in the lower court contended that the tender to petitioner of currency in payment of his bond was a compliance with the terms of the bond, on the ground that currency is the "equivalent" of gold. To support this position, they quote from the opinion of the Chief Justice in *Perry v. The United States*, at page 357, in which he states that the word "equivalent" cannot mean more than the amount of money which the promised gold coin would be worth to the bondholder for the purpose for which it could legally be used. But in that case the plaintiff sued for $10,000 in gold coin, or its equivalent in currency, which the plaintiff claimed to be $16,931.25. The Chief Justice held that this was not necessarily the equivalent in currency, and that many other circumstances, such as the price level and the intrinsic worth of the currency, had a bearing on the question. The entire discussion related solely to the question of damages. In this case, however, the question of damages does not arise, nor is the petitioner asking for any "equivalent." It is the Government which is tendering the petitioner something, in redemption of his bond prior to maturity, which the Government is claiming to be the "equivalent" of gold.

Certainly currency is not the same as gold coin. This Court necessarily holds that it is different in holding the Joint Resolution of June 5, 1933, unconstitutional. That Resolution provided:

> "Every obligation heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

The very thing which Congress was attempting to do was to make legal-tender currency the equivalent of gold coin. When this Court stated that "the Joint Resolution of June 5, 1933, insofar as it attempted to override the obligation created by the bond in suit, went beyond the congressional power," it necessarily held that legal-tender currency was not the equivalent of gold coin.

The right of redemption is based on exact compliance with the terms of the bond. Petitioner is not obligated to allow his bond to be redeemed, even though the Government does offer an equivalent or far more than an equivalent. The right of redemption rests on the words of the bond and the circular, which say nothing whatever about an "equivalent."

We respectfully submit, therefore, that the entire procedure by which the Government attempted to call Liberty Bonds in advance of maturity, when it had no intention to pay the bonds in accordance with their terms and statutes expressly forbade such payment, was void *ab initio*, because the notice published was not the notice provided for by the bond. It follows, therefore, that interest did not cease to run on the date fixed for redemption, but continued as part of the original contract entered into by the Government in its bond.

Our position is supported by the decision of the Circuit Court of Appeals for the Fourth Circuit, in the case of *Machen v. United States of America*, 87 Fed. (2d) 594, p. 597. Judge Parker said:

> "It would hardly be contended that a notice to the effect that the Government would redeem the bonds at fifty-nine cents on the dollar would be a sufficient notice under the bond to stop the running of interest and avoid the subsequently maturing coupons; but it will be seen that this is precisely what the notice as published means when the acts of Congress and the presidential proclamation affecting the currency are read into it, and when it is remembered that Congress is without power to abrogate

the gold clause as contained in obligations of the Government. * * *

"It follows that because of the legislation and the presidential proclamation to which we have referred, the Secretary of the Treasury was without power, both at the time of the publication of the notice and at the time fixed for redemption, either to pay gold on the gold clause bonds or to pay in paper money the value of the gold *which they promised. He was consequently without power under the laws to redeem these gold clause bonds* at their face value; and the notice of redemption which *he issued must be construed in the* light of this lack of power."

3. EVEN IF THE PURPORTED CALL WERE CONSIDERED VALID, THE RUNNING OF INTEREST ON PETITIONER'S BOND DID NOT CEASE ON JUNE 15, 1935, BECAUSE THE UNITED STATES WAS NOT READY AND WILLING AT THAT TIME OR AT ANY TIME TO REDEEM THE *PETITIONER'S* BOND IN ACCORDANCE WITH ITS TERMS.

The defendant stresses the language of the petitioner's bond reading as follows: "From the date of redemption designated in any such notice, interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void." Under Section 2 of this argument, we have pointed out that this clause does not apply because the notice actually given was not the notice contemplated by the bond; but we now submit further that even if such a notice had been given, interest would not cease if the Government never contemplated the redemption of the bond in accordance with its terms or made any provision for such redemption. The clause must be interpreted in the light of other covenants of the bond, of the coupon, of the understanding of the parties, and of the contract as a whole.

Surely the clause quoted does not mean that interest shall cease on the mere issue of a call, though made expressly in gold coin, if there were no intention or ability to redeem the bonds on the call date. Analyzing the situation in the case of called bonds, it would appear that interest ceases (1) if proper notice of redemption is given, and (2) if the obligor is pre-

pared to pay the bond in accordance with its terms on the date set. If a corporation calls bonds, and then fails to have the money on hand to redeem the bonds in accordance with the call, the holder of such bonds surely has the option of retaining his bonds until maturity and collecting interest. It is possible that he also has the option of availing himself of the terms of the call and suing for immediate payment on the ground that the debtor has estopped itself from denying the validity of the call.

The necessary and logical conclusion from the Government's position is that under the terms of the bond the Government could call a bond without the slightest intention of paying it and thereby cause interest to stop running. In the *Perry* case, this Court insisted on the sacredness of the Government's obligations. The construction of the obligation insisted on by the Government would enable it to cancel its sacred obligations.

In the case of *Sterling v. H. F. Watson Company*, 241 Pa. 105, 88 Atl. 297 (1913), the defendant attempted to call its preferred stock by the payment of its par value and accrued dividends, which it was entitled to do, but attempted to deduct from the accrued dividends the par value of a twenty-five per cent stock dividend which had been distributed eight years before. The stockholder sued to restrain the company from stopping dividends after the call date, and from refusing to transfer the stockholder's stock. The Supreme Court of Pennsylvania held that the twenty-five per cent stock dividend could not be considered under the terms of the preferred stock redemption clause, and granted the stockholder's petition, requiring the company to treat the plaintiff as a stockholder by transferring his stock, and to continue the payment of semi-annual dividends until a call was issued strictly in accordance with the terms of the redemption clause.

In *Corbett, Executrix, v. McClintic-Marshall Corporation*, 17 Delaware Chancery 165 (1930), the directors of the company exercised their charter right to redeem complainant's preferred stock, but complainant contended that the price at which they proposed to redeem was not the correct price. On demurrer, the Chancellor held that the petition stated

a proper cause of action, but that the complainant was not entitled to insist on cash redemption at the higher price which she claimed, because this was within the discretion of the board of directors, a discretion which they had not exercised. The court held, however, that she was entitled, if she proved her case, to retain the status of a preferred stockholder. The court said, on page 171:

> "In view of the fact that the bill shows that the defendant has notified the complainant in substance that she is to be denied the status of a preferred stockholder in the future, the nature of the case, if the complainant be right in her claims touching the alleged illegality of the proposed redemption, requires a decree that though she cannot on the facts alleged enforce a redemption in accordance with her specific prayers, yet the defendant is bound to treat her as a preferred stockholder until proper redemption of her stock has been effected."

It is well settled that holders of bonds without a call provision cannot be made to accept payment in advance of maturity: *Chicago, etc. Railroad Co. v. Pyne*, 30 Fed. 86; *Missouri Railroad Co. v. Union Trust Co.*, 156 N. Y. 592. 51 N. E. 309. A statute providing that payment must be accepted before maturity is unconstitutional; *Randolph v. Middleton*, 26 N. J. Equity 543. Surely an effective call cannot be issued unless it is followed by a tender of the money either to a trustee or paying agent in the case of a private corporation, or direct to the bondholder in the case of the United States. As the Court of Appeals of New York said, in the case of *Missouri Railroad Co. v. Union Trust Company*, supra:

> "They (the bondholders) have the right to have their bonds redeemed only according to the contract, and unless they are so redeemed, to hold them and draw interest upon them until the day of payment shall arrive."

We respectfully call the court's attention to the English case of *Gordillo v. Weguelin*, 5 Chancery Division 287 (1877), in which the question of cessation of interest was discussed. In that case a mortgage indenture provided that the debtor would pay interest and five per cent of the principal sum semi-annually. Provision was made that a certain amount of bonds should be drawn for redemption on May first and November

first of each year, to be redeemable on the following June first and December first, respectively. The indenture then provided: "but no interest shall be payable on any drawn bond after the date fixed for its redemption." The debtor having defaulted, the trustees took possession after certain bonds had been drawn and called, but before they had been redeemed. The question arose whether the holders of bonds drawn for redemption, but whose bonds the trustee was unable to pay, were entitled equally with holders of undrawn bonds to receive interest. The court held, despite the words quoted above, that interest continued to accrue on the drawn bonds, because they had *not* been paid on the date fixed for redemption, and that such interest had the same status under the terms of a deed of trust as interest on the undrawn bonds. Lord Justice James said:

> "I am of opinion that upon the whole deed what was intended was that interest should run until the bond was paid, or until it was payable according to the terms of the deed, that is *de facto* payable out of funds provided for that purpose. When the bonds were in truth payable, not payable in the sense of the money being recoverable in an action at law, or anything of that kind, but payable by reason of the fund being provided for the purpose of paying them, either in the hands of the contractors or received by the trustees, then the interest would cease, and until it was so payable in truth and in fact, as well as in legal right of action, the interest runs."

While the petitioner's bond provided that from the date of redemption designated in any notice of call, interest on the called bonds should cease, yet the bond also contained the express provision that "all or any of the bonds of the series of which this is one, may be redeemed *and paid* (italics ours) * * * ." Certainly this provision for redemption and payment would not have been inserted in the bond, if it were the intention of the parties that interest should cease upon a date set for redemption, regardless of the willingness and ability of the United States to redeem.

The Government relies on the phrase used in the first sentence of the bond, in which the United States promises to pay the principal sum "with interest at the rate of three and one-half percentum per annum payable semi-annually on Decem-

ber fifteenth and June fifteenth in each year until the principal hereof shall be payable." The Government points out that the Government does not undertake to pay interest until the principal shall be "paid." Of course it is clear why the word "payable" is used. Many holders of such bonds do not turn in their bonds on the call date, through oversight or otherwise, and it is proper that interest should cease to run at that time in the ordinary case when the Government is meeting its obligations. In order to provide for this contingency, the word "payable" is used.

If it had been thought necessary to provide for the contingency that the Government would repudiate its bonds, only a very complicated phrase could have expressed the Government's obligation. It would have had to refer to a repudiation, which nobody thought likely or desired to refer to. Contracts seldom provide for what shall occur in case of default because they are made to be carried out and not to be broken. It is usual to leave to the courts the question of the parties' rights when such a default does occur. This is particularly true in the case of the Government, for, as stated by Mr. Justice Strong in *United States v. Sherman*, 98 U.S. 565: "But delay or default cannot be attributed to the Government. It is presumed to be always ready to pay what it owes."

Furthermore, the word "payable" refers to the maturity of the bond, and not to any date on which it may be redeemable. We direct the attention of this Court to its entire opinion in the case of *Morgan v. United States*, 113 U.S. 476. This Court quoted from several of its earlier decisions, in which a distinction was made between the words "redeemable" and "payable," and in which it was pointed out that bonds do not become payable until the maturity date, although they may under their terms be redeemable prior to such date. We submit that the wording of the bond that it shall bear interest until the principal becomes payable is a stock phrase employed by generations of bond draftsmen, meaning simply that the bond will bear interest until maturity. When the word "payable" is considered in the light of its true meaning, as set forth in the Morgan case, as simply the maturity date of the bond, it is readily seen that the cases of *Sterling v. Watson Co.*,

supra, and *Corbett, Executrix, v. McClintic-Marshall Corporation*, 17 Del. Chancery 165, distinguished by the Court of Claims in its opinion, are applicable to the instant case. Furthermore, the case of *Spaulding v. Lord*, 19 Wis. 533, relied upon by the Court of Claims, has no application to the present case, for in that case the meaning of the word "payable" was the maturity date of a five-year improvement fund certificate. In that case there was no right reserved to redeem the certificate prior to maturity, nor was any attempt made. The only question presented to the court was whether or not, after maturity, the bond bore interest at the rate designated in the certificate or at the statutory rate.

We respectfully submit, therefore, that if the contract is construed in accord with the intention of the parties, interest would not cease on June 15, 1935, even though the call had been expressly a call for payment in gold coin. This is the view expressed in a note in 50 Harvard Law Review 986. If there is any ambiguity, the bond should be construed most strongly against the Government because drafted by its own officials, and sold to persons who did not even contemplate the repudiation of its obligations by the United States. Certainly this Court should not countenance an interpretation of the bond which necessarily means that the Government may at any time call a bond without the slightest intention of paying it, and thereby stop the running of interest after the call date, whether or not the Government is prepared to redeem the bond on that date. This is not the contract which the bondholders thought they were getting.

4. THE PURPORTED CALL ISSUED ON MARCH 14, 1935, WAS VOID, BECAUSE THE SECRETARY OF THE TREASURY HAD NO AUTHORITY TO ISSUE A CALL WITHOUT FURTHER ACTION BY CONGRESS.

As pointed out on page 10, the First Liberty Loan Act authorized the Secretary of the Treasury to prescribe the terms of redemption of bonds issued under such act. Under such broad authority, the Secretary of the Treasury might have prescribed any one of several methods for issuing a notice of call. He actually did prescribe that the First Liberty Loan Bonds should be redeemable at the pleasure of the United

States. In the case of *Morgan v. United States*, 113 U. S. 476, Mr. Justice Matthews, writing the opinion for this Court, referred to the provision as to calling bonds there involved, and stated:

> "The pleasure of the Government to redeem them or any part of them, of course, could only be declared by law. Provision to this effect was made by the Act of July 14, 1870."

We respectfully submit that the conclusion of this Court in that case was correct. There is no more reason why the pleasure of the Secretary of the Treasury should be the pleasure of the United States than the pleasure of the President, or of the Vice-President, or any other officer of the Government. The redemption of bonds is a major financial transaction, requiring the consideration of Congress. The Secretary of the Treasury, between October 12, 1933, and August 1, 1935, determined to call nearly nine billion dollars in bonds payable in gold, at a time when the terms of the bonds could not be complied with. The policy followed involved a repudiation by the Government of its solemn obligations declared to be such by this Court in the case of *Perry v. United States*, 294 U. S. 330. Certainly no one would maintain that an individual, holding an appointed office in a government founded on the theory of popular representation and control, would have the right to obligate the country for nine billion dollars. We submit that he has no greater right to exercise the pleasure of the United States in repudiating obligations incurred on the authorization of Congress.

5. THE PURPORTED CALL ISSUED ON MARCH 14, 1935, WAS VOID BECAUSE FORBIDDEN BY SECTION 731 OF TITLE 31 OF THE UNITED STATES CODE (ACT OF MARCH 18, 1869, 16 STAT. 1).

This Section 731 provides:

> "None of the interest-bearing obligations not already due shall be redeemed or paid before maturity, unless at such time United States notes are convertible into coin

at the option of the holder, or unless at such time bonds of the United States bearing a lower rate of interest than the bonds to be redeemed can be sold at par in coin."

The reason for the original passage of this law was obviously to prevent the Government from doing just what it is attempting to do now—paying off its obligations to its bondholders in a depreciated currency. United States notes, or "greenbacks," were, of course, at a considerable discount from gold in 1869, and were not redeemable in gold or silver coin at that time. In order to protect the bondholders, Congress provided that none of the interest-bearing obligations should be redeemed or paid before maturity as long as United States notes were not convertible into coin at the option of the holder. Neither on March 4, 1933, nor at any subsequent date have United States notes been convertible into coin at the option of the holder. The Government, and not the holder, has the option, and it may pay out currency of any kind for any United States notes presented.

The proviso at the end of Section 731 was intended to permit the redemption of bonds if the Government is in a position to sell its bonds and receive gold for them, even though they bear a lower rate of interest. If the bonds bearing a lower rate of interest can only be sold for currency, then no call can be made. It is obvious that Government Bonds, when this call was issued in 1935, could not be sold for gold coin. There was no gold coi except in mirror hoards, and if anyone could lawfully have obtained gold, he would not have paid gold for United States Bonds, whether on their face they were payable in gold in currency.

It is suggested that United States Bonds might have been sold for silver coin. Obviously the Government has never sold bonds and required payment in silver coin, and it is not a practical operation. An examination of the testimony and schedule presented by the Treasury (R. 18) shows that the total amount of silver coin in existence in 1935 was approximately eight hundred fifty-nine million dollars, considerably less than the amount of the First Liberty Loan Bonds called. Furthermore, all of the bullion and nearly all of the standard silver dollars were in the Treasury already, and of course the

subsidiary silver coin not in the Treasury, amounting to about $300,000,000, is required for ordinary change throughout the country. Furthermore, the silver coin has a purely fictitious value in excess of the value of the silver contained in such coins, and in effect is nothing but subsidiary currency. In 1869 it might have been possible for the Government to sell gold bonds and require payment in gold coin, thus obtaining the gold coin necessary to redeem the prior issue, but since the validity of the gold clause is in doubt, such bonds cannot be sold either for gold or silver coin today. In short Section 731 was intended to prevent exactly what the Government is now trying to do.

CONCLUSION

We respectfully submit that interest did not cease on June 15, 1935, on First Liberty Loan Bonds, because for the various reasons stated in sections 2, 4 and 5 of our argument, no valid call was ever issued for the redemption of such bonds, and because, as we have shown under section 3 of our argument, even if such a call were issued, the unwillingness and inability of the Government to redeem the bonds in accordance with their terms would demand a continuance of interest until maturity. The decision of the Court of Claims denies "the validity of the public debt of the United States, authorized by law" in violation of the Constitution of the United States.

Respectfully submitted,

ROBERT A. TAFT,
Attorney for Petitioner.

CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 43

THE DIXIE TERMINAL COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 7, 1937

CERTIORARI GRANTED JUNE 1, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 961

THE DIXIE TERMINAL COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 10, 1937.

[fol. 1]

IN UNITED STATES COURT OF CLAIMS

No. 42948

THE DIXIE TERMINAL COMPANY, Plaintiff,

vs.

THE UNITED STATES, Defendant

I. PETITION—Filed March 11, 1935

1. Plaintiff is a corporation organized and existing under the laws of the State of Ohio, and is the owner, holder for value and bearer of an obligation of the United States of America, in principal amount of Fifty Dollars ($50.00), known as Fourth Liberty Loan 4¼% Gold Bond of 1933-1938, Serial Number A00055321, a copy of which is annexed hereto and made a part hereof, marked "Schedule A." Said bond is one of a series of 4¼% Gold Bonds of 1933-[fol. 2] 1938, authorized by an Act of Congress approved September 24, 1917, as amended, and issued pursuant to Treasury Department Circular No. 121, dated September 28, 1918, a copy of relevant provisions of which is annexed hereto and made a part hereof, marked "Schedule B." By the terms of said bond, the defendant promised to pay to bearer on October 15, 1938, the principal sum of Fifty Dollars in United States gold coin of the standard value on the date of issuance, October 24, 1918, and to pay interest on said principal sum in like gold coin at the rate of four and one-quarter per cent (4¼%) per annum from the date of the bond, on April fifteenth and October fifteenth in each year, until the principal should be payable, upon presentation and surrender of the interest coupons as they severally mature.

2. Plaintiff is the owner, holder for value and bearer of an interest coupon formerly attached to said bond, a copy of which is attached hereto and made a part hereof, marked "Schedule C," by the terms of which defendant promised to pay to bearer on October 15, 1934, the sum of One Dollar and Seven Cents ($1.07) in United States gold coin of the standard of value on the date of issuance, being six months' interest due October 15, 1934, on the bond hereinbefore referred to.

3. Plaintiff is the owner, holder for value and bearer of three interest coupons formerly attached to said bond in the same form as the coupon referred to in paragraph 2 hereof, but maturing on April 15, 1933, October 15, 1933, and April 15, 1934, respectively.

4. Under and pursuant to the laws of the United States, namely: an Act approved March 14, 1900 (31 Stat. 45), which was in force on October 24, 1918, at the time of the issuance of said bond, a dollar in gold consisted of twenty-five and eight-tenths (25 8/10) grains of gold, nine-tenths (9/10) fine.

[fol. 3] 5. The aforesaid bond and circular contained provisions that all or any of the bonds of its series might be redeemed at the pleasure of the United States on and after October 15, 1933, at par and accrued interest, in United States gold coin of the standard of value on the date of issuance, and that from the date of redemption designated interest on bonds called for redemption should cease. On October 12, 1933, the defendant, through and by the Secretary of the Treasury, in Treasury Department Circular No. 501, a copy of the relevant provisions of which is attached hereto and made a part hereof, marked "Schedule D," called for redemption on April 15, 1934, a part of said issue of Fourth Liberty Loan 4¼% Gold Bonds of 1933-1938, including all outstanding coupon bonds bearing the serial numbers the final digit of which was 9, 0, or 1, and therefore including the aforesaid bond.

6. On March 11, 1935, plaintiff duly presented to the defendant at the Treasury Department, Washington, D. C., the three interest coupons referred to in paragraph 3 hereof, and demanded payment thereof in gold dollars, each containing twenty-five and eight-tenths (25 8/10) grains of gold, nine-tenths (9/10) fine. The defendant refused payment of said coupons except in legal tender currency.

7. Thereafter and on March 11, 1935, plaintiff duly presented said bond to the Treasurer of the United States, Washington, D. C., in accordance with said Act of September 24, 1917, as amended, said Treasury Department Circular No. 121, and said Treasury Department Circular No. 501, and demanded of said defendant that it redeem said bond by the payment of fifty gold dollars, each containing twenty-five and eight-tenths grains of gold, nine-tenths fine.

The defendant refused to redeem said bond in accordance with its terms, or in any manner except by the payment of fifty dollars in legal tender currency. Plaintiff thereupon refused to accept said currency, or permit the redemption of said bond, and is still the owner, holder and bearer of said bond.

[fol. 4] 8. Thereafter, and on March 11, 1935, plaintiff duly presented to the defendant at the Treasury Department, Washington, D. C., the aforesaid interest coupon due October 15, 1934, in accordance with said Act of September 24, 1917, as amended, and said Treasury Department Circular No. 121, and demanded payment thereof in the sum of one dollar and seven cents either in gold coin or legal tender currency. Defendant thereupon refused payment of said coupon, on the ground that the bond to which it had been attached had been previously called for redemption.

9. Plaintiff is informed and believes that defendant's refusal to redeem said bond and pay the three interest coupons referred to in paragraph 3 of this petition in accordance with its terms was based on the ground that the Joint Resolution of the Seventy-Third Congress, approved June 5, 1933, (C. 48, 48 Stat. 112) nullified the provisions of said bond requiring payment in gold. Plaintiff says that said Joint Resolution, insofar as it attempted to override the obligation created by the aforesaid bond and coupons, was beyond the power of Congress to adopt, and was unconstitutional and void, and violated the provisions of the Fifth Amendment, and of Section 4 of the Fourteenth Amendment, to the Constitution of the United States.

10. Plaintiff says, therefore, that defendant had no right to call said bond for redemption except on the payment of fifty gold dollars, each containing twenty-five and eight-tenths grains of gold, nine-tenths fine; and that the action of defendant in issuing said Treasury Department Circular No. 501 and tendering to plaintiff fifty dollars in legal tender currency did not constitute a redemption of said bond, and the obligations of said bond are still in full force and effect.

11. Plaintiff says that the defendant has publicly announced that it will not pay the Fourth Liberty Loan Bonds [fol. 5] in gold dollars of the standard of value existing on

the date of their issuance, and has thereby forfeited, while such repudiation continues, any rights or privileges conferred on it by the terms of said bonds, including the right or privilege to redeem the said bonds before the maturity thereof.

12. Plaintiff says that the defendant, by its refusal to pay in United States gold dollars containing twenty-five and eight-tenths grains of gold nine-tenths fine the three interest coupons referred to in paragraph 3 hereof repudiated its obligations on the aforesaid bond, and forfeited any rights or privileges conferred on it by the terms of said bond, including the right or privilege to redeem the said bond before the maturity thereof.

13. Plaintiff says that under authority of the Gold Reserve Act of 1934 the President of the United States, on January 31, 1934, fixed the weight of the gold dollar to be fifteen and five twenty-firsts (15 5/21) grains, nine-tenths (9/10) fine, instead of the former weight of twenty-five and eight-tenths (25 8/10) grains, nine-tenths (9/10) fine. Plaintiff says further that if its said bond is redeemable in legal tender currency, or in gold dollars of the present standard of value, said bond will be of less value to him than if it is redeemed in gold dollars of the standard of value formerly existing, or if it is irredeemable before its maturity date on October 15, 1938; and that obligations of the United States due in three years and seven months are now selling on a 1¼% basis, and would be valued at approximately 110.5% of par, if bearing interest at the rate of four and one-quarter per cent (4¼%), whereas bonds validly called for redemption at par are not worth more than par after the date of redemption.

14. Plaintiff is the sole owner of the bond and coupons referred to and of the claim herein made, and the only person interested therein. There has been no assignment or [fol. 6] transfer of this claim, or of any interest therein, and plaintiff is justly entitled to recover the amount herein claimed from the Government of the United States, after allowing all just credits and offsets.

15. No action upon the plaintiff's claim has been had by or before Congress, or, except as aforesaid, any Executive Department of the Government.

16. Plaintiff is, and at all times herein mentioned was, a citizen of the United States, has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

17. Wherefore plaintiff prays judgment against defendant in the sum of One Dollar and Seven Cents ($1.07), the face amount of the aforesaid coupon described in paragraph 2 hereof, which sum is now due and owing by the United States to plaintiff, and no part of which has been paid.

18. The address of plaintiff is Dixie Terminal Building, Cincinnati; the address of the attorney for plaintiff, Robert A. Taft, is 420 Dixie Terminal Building, Cincinnati, Ohio.

Robert A. Taft, Attorney for The Dixie Terminal Company.

Duly sworn to by Robert A. Taft. Jurat omitted in printing.

[fol. 7] SCHEDULE "A" TO PETITION

$50. $50 A00055321*.

Fourth Liberty Loan

4¼% Gold Bond of 1933-1938

The United States of America for value received promises to pay to the bearer the sum of Fifty Dollars on October 15, 1938, and to pay interest on said principal sum at the rate of four and one-quarter per cent per annum from the date hereof on April 15 and October 15 in each year until the principal hereof shall be payable upon presentation and surrender of the interest coupons as they severally mature, at the Treasury Department, Washington, or at the holder's option, at any agency or agencies in the United States which the Secretary of the Treasury may from time to time designate for the purpose. The principal and interest hereof are payable in United States gold coin of the present standard of value. This bond is one of a series of four and one-quarter per cent gold bonds of 1933-1938 authorized by an Act of Congress approved September 24, 1917, as amended and issued pursuant to Treasury Department Circular No. 121, dated September 28, 1918, to which reference is hereby made

for a statement of the further rights of the holders of bonds of said series as fully and with the same effect as if herein set forth. All or any of the bonds of said series may be redeemed at the pleasure of the United States, on and after October 15, 1933, at par and accrued interest as in said circular provided. This bond does not bear the circulation privilege.

Washington, October 24, 1918.

Recorded: J. O.

W. G. McAdoo, Secretary of the Treasury.

Houston B. Teehee, Register of the Treasury.

Act approved September 24, 1917, as amended.

Eight Coupons, April 15, 1935 to October 15, 1938, Attached.

[fol. 8] SCHEDULE "B" TO PETITION

Treasury Department,
Office of the Secretary,
Washington, September 28, 1918.

The Secretary of the Treasury invites subscriptions, at par and accrued interest, from the people of the United States for $6,000,000,000 of United States of America Four and One-Quarter Per Cent Gold Bonds of 1933-1938, of an issue authorized by an Act of Congress approved September 24, 1917, as amended by the Acts of Congress approved April 4, 1918, and July 9, 1918, and supplemented by an Act of Congress approved September 24, 1918, the right being reserved to allot additional bonds up to the full amount of any oversubscription.

Description of Bonds

Denominations:

Bearer bonds with interest coupons attached will be issued in denominations of $50, $100, $500, $1,000, $5,000, and $10,000. Bonds registered as to principal and interest will be issued in denominations of $50, $100, $500, $1,000, $5,000, $10,000, $50,000, and $100,000. Provision will be made for the interchange of bonds of different denominations and of coupon and registered bonds and for the transfer of regis-

tered bonds, without charge by the United States, and under rules and regulations prescribed by the Secretary of the Treasury.

Rate of Interest, Date of Bonds, Maturity and Redemption:

The bonds will be dated October 24, 1918, and will bear interest from that date at the rate of four and one-quarter per cent per annum, payable on April 15 and October 15 in each year. The interest payable on April 15, 1919, will be for 173 days. The bonds will mature October 15, 1938, but the [fol. 9] issue may be redeemed at the pleasure of the United States on and after October 15, 1933, in whole or in part, at par and accrued interest, on any interest day or days, on six months' notice given in such manner as the Secretary of the Treasury shall prescribe. In case of partial redemption the bonds to be redeemed will be determined by such method as may be prescribed by the Secretary of the Treasury. From the date of redemption designated in any such notice, interest on bonds called for redemption shall cease. The principal and interest of the bonds are payable in United States gold coin of the present standard of value.

SCHEDULE "C" TO PETITION

The United States of America

will pay to bearer on October 15, 1934, at the Treasury Department, Washington, or at a designated agency, $1.07, being six months' interest then due on $50 Fourth Liberty Loan 4¼% Gold Bonds of 1933-1938 unless called for previous redemption.

A00055321*. (32)

Houston B. Teehee, Register of the Treasury.

SCHEDULE "D" TO PETITION

Treasury Department,
Office of the Secretary,
Washington, October 12, 1933.

To Holders of Fourth Liberty Loan 4¼ per cent Bonds of 1933-38, and Others Concerned:

1. Notice of Call for Partial Redemption of Fourth Liberty Loan 4¼ per cent Bonds of 1933-38 (Fourth 4¼'s) Before Maturity

1. Pursuant to the provision for redemption contained in the bonds and in Treasury Department Circular No. 121, dated September 28, 1918, under which the bonds were [fol. 10] originally issued, all outstanding Fourth Liberty Loan 4¼ per cent bonds of 1933-38, hereinafter referred to as Fourth 4¼'s, bearing the serial numbers which have been determined by lot in the manner prescribed by the Secretary of the Treasury, are called for redemption on April 15, 1934, as follows:

All outstanding permanent coupon bonds bearing serial numbers the final digit of which is 9, 0, or 1, such serial numbers being prefixed by a corresponding distinguishing letter J, K, or A, respectively;

All outstanding temporary coupon bonds bearing serial numbers the final digit of which is 9, 0, or 1; and

All outstanding registered bonds bearing serial numbers the final digit of which is 9, 0, or 1.

2. Interest on all such outstanding Fourth 4¼'s so called for redemption will cease on said redemption date, April 15, 1934.

3. Fourth 4¼'s bearing serial numbers (and prefix letters) other than those designated are not included in or affected by this call for partial redemption.

III. Optional Exchange Offering

1. Holders of Fourth 4¼'s will be offered the privilege, for a limited period beginning on October 16, 1933, of exchanging all or part of their bonds (whether called or uncalled) at par, for a new issue of 10-12 year Treasury bonds, dated October 15, 1933, and bearing interest from

that date at the rate of 4¼ per cent per annum until October 15, 1934, and thereafter at the rate of 3¼ per cent per annum. The new bonds will mature on October 15, 1945, but may be called for redemption, in whole or in part, at par and accrued interest, on and after October 15, 1943, on four months' notice.

[fol. 11] II. History of Proceedings

On April 20, 1935, the defendant filed a motion to extend time to May 22, 1935, in which to plead.

On April 24, 1935, the plaintiff filed an opposition to said motion and requested that case be placed on the Law Calendar.

On April 24, 1935, the court entered the following order on said motions:

Order

Now on this twenty-fourth day of April, 1935, the motion of the defendant to extend time to plead to the petition to May 22, 1935, and the plaintiff's motion to place the case upon the law calendar for a prompt hearing having been considered, It is Ordered by the Court that the defendant have until May eighth to plead to plaintiff's petition and said motions are otherwise overruled.

III. General Traverse—Filed May 8, 1935

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Geo. C. Sweeney, Assistant Attorney General.

IV. Argument and Submission of Case

On March 9, 1936, this case was argued and submitted on merits by Mr. Robert A. Taft, for plaintiff, and by Mr. Assistant Attorney General James W. Morris, for defendant.

[fol. 12] V. Further Proceedings in Case

On April 20, 1936, this court certified certain questions to the Supreme Court.

On June 29, 1936, the mandate of the Supreme Court, dated June 1, 1936, dismissing the certificate was filed in this office.

[fol. 13] VI. **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Littleton, J.**— Filed November 9, 1936

Mr. Robert A. Taft for the plaintiff.

Mr. Assistant Attorney General James W. Morris for the defendant.

Mr. Harry Le Roy Jones was on the brief.

In this action plaintiff seeks to recover in currency of the United States the amount specified in an interest coupon attached to a Fourth Liberty Loan 4¼% Gold Bond in the principal amount of $50 issued pursuant to the Act of Congress of September 24, 1917, Treasury Department Circular 121, September 28, 1918.

The due date of this coupon was October 15, 1934, six months after the date on which the principal of the bond became payable under a call for redemption duly issued by the defendant. This interest coupon provided for the payment of interest therein specified, unless the bond was called for previous redemption. The bond provided that the United States would pay interest on the amount thereof "until the principal hereof shall become payable." The bond and circular, pursuant to which the bond was issued, provided that the bond might be redeemed at the pleasure of the United States in whole or in part, at par and accrued interest, on any interest day or days, on six months' notice, given in such manner as the Secretary of the Treasury should prescribe and "from the date of redemption designated in any such notice interest on bonds called for redemption shall cease."

[fol. 14] Plaintiff contends that the defendant's call for redemption was ineffective because of the Government's refusal to pay the bond in gold and that interest continued to accrue and become payable on the bonds thus called

for redemption. Similar calls for redemption were made by the United States about the same time with respect to gold-clause bonds totaling $8,849,540,000.

Special Findings of Fact

1. March 9, 1935, plaintiff, an Ohio corporation, purchased a bond of the United States in the principal sum of $50, known as the Fourth Liberty Loan 4¼% Gold Bond of 1933-1938, serial number A00055321, and paid therefor $51.75 plus $5.31, accrued interest, totaling $57.06. This bond is in evidence as plaintiff's exhibit 2, and such exhibit and all other exhibits hereinafter mentioned are made a part of these findings by reference. Payment was made for the bond by New York draft payable in dollars. At this time the Fourth Liberty Loan 4¼% Bonds of 1933-1938 in coupon form, bearing the serial numbers the final digit of which was 9, 0, or 1, such serial numbers, in the case of permanent coupon bonds, prefixed by the distinguishing letters J, K, or A, respectively, and designated in Treasury Department Circular 501, as called for redemption on April 15, 1934, were not listed on any exchange but were occasionally available in the open market and selling at not in excess of their dollar face amount and interest accrued to the date of redemption as fixed in the notice of call embodied in the Treasury Department circular.

Plaintiff was not engaged or authorized to engage in any business in which gold coin or gold bullion was necessary for its operation.

At the time of purchase this bond had attached to it interest coupons maturing April 15, 1933, October 15, 1933, April 15, 1934, and October 15, 1934. The interest coupon covering the period April 15 to October 15, 1934, upon which this suit is based, is in evidence as plaintiff's exhibit 3. The bond to which the interest coupon in question was attached is one of a series of 4¼% gold bonds authorized by an Act of Congress approved September 24, 1917, as amended, and issued pursuant to Treasury Department [fol. 15] Circular 121 of September 28, 1918. Thic circular, which is in evidence as plaintiff's exhibit 5, provided in part as follows:

"The bonds will be dated October 24, 1918, and will bear interest from that date at the rate of four and one-quarter

percent per annum, payable on April 15 and October 15 in each year. The interest payable on April 15, 1919, will be for 173 days. The bonds will mature October 15, 1938, but the issue may be redeemed at the pleasure of the United States on and after October 15, 1933, in whole or in part, at par and accrued interest, on any interest day or days, on six months' notice given in such manner as the Secretary of the Treasury shall prescribe. In case of partial redemption the bonds to be redeemed will be determined by such method as may be prescribed by the Secretary of the Treasury. From the date of redemption designated in any such notice, interest on bonds called for redemption shall cease. The principal and interest of the bonds are payable in United States gold coin of the present standard of value."

2. October 11, 1933, the Acting Secretary of the Treasury, pursuant to the requirement of Circular 121, prescribed rules for the determination of the bonds to be called in partial redemption of the Fourth Liberty Loan 4¼% bonds of 1933-1938, and designated the manner of giving notice of the bonds so called for redemption. A copy of these rules is in evidence as joint exhibit A. On the same day the Acting Secretary of the Treasury issued a certificate of partial redemption of the Fourth Liberty Loan 4¼% bonds of 1933-1938, bearing serial numbers, the final digit of which was 9, 0, or 1, such serial numbers, in the case of permanent coupon bonds, prefixed by the distinguishing letters J, K, or A, respectively. This certificate is in evidence as joint exhibit B.

The following day, October 12, 1933, the Secretary of the Treasury issued a notice of call for partial redemption on April 15, 1934, of the Fourth Liberty Loan 4¼% gold bonds of 1933-1938, in which the bond in controversy was included. This notice of call is in evidence as joint exhibit C. This call for redemption stated, so far as material here, as follows:

"Pursuant to the provision for redemption contained in the bonds and in Treasury Department Circular No. 121, [fol. 16] dated September 28, 1918, under which the bonds were originally issued, all outstanding Fourth Liberty Loan 4¼ percent bonds of 1933-38, hereinafter referred to as Fourth 4¼'s, bearing the serial numbers which have been

determined by lot in the manner prescribed by the Secretary of the Treasury, are called for redemption on April 15, 1934. * * *

"Holders of Fourth 4¼'s are offered the privilege, for a limited period, beginning October 16, 1933, of exchanging all or part of their bonds (whether called or uncalled) for a new issue of 10-12 year Treasury bonds, dated October 15, 1933, and bearing interest from that date at the rate of 4¼ percent per annum until October 15, 1934, and thereafter at the rate of 3¼ percent per annum."

3. March 11, 1935, plaintiff presented the bond with the coupons for the six-months periods ending on and before October 15, 1934, detached, to the Treasurer of the United States and demanded the redemption of the bond by the payment of 50 gold dollars, each containing 25.8 grains of gold, .9 fine. At the time of this demand the Treasurer refused payment of the bond in gold, but the defendant was ready and willing to make full payment at par in coin or currency of the United States legal tender. Plaintiff, thereupon, refused to accept payment for the bond at par in legal-tender currency and retained the bond. Thereafter, on the same date, plaintiff presented the interest coupon for the six-months period ending October 15, 1934, to the Treasurer of the United States and demanded payment therefor in the sum of $1.07, either in gold coin or legal-tender currency. The Treasurer refused payment on the ground that the bond had been called for redemption on April 15, 1934.

4. The plaintiff on March 11, 1935, held no license authorizing it to receive or hold gold coin or gold bullion. It owned no Government bond containing a gold clause on June 5, 1933, October 12, 1933, April 15, 1934, or October 15, 1934.

[fol. 17] CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

OPINION

LITTLETON, Judge, *delivered the opinion of the court:*

The question presented in this case is whether the interest coupon upon which this suit is based covering the period April 15 to October 15, 1934, is an obligation of the United States upon which this action can be maintained, in view of the terms of the Liberty bond obligation and notice of call for redemption on April 15, 1934.

Plaintiff contends (1) that the provisions of the bond and circular with respect to payment of gold are valid, notwithstanding the joint resolution of Congress of June 5, 1933, and the Gold Reserve Act of January 30, 1934; (2) that the lack of remedy found to exist in Perry v. United States, 294 U. S. 330, is not material in this case, inasmuch as plaintiff is not suing for gold, and is not seeking damages for failure to pay gold, but is claiming only that the Government was without authority to call the bonds in advance of maturity unless it tendered gold or its equivalent; (3) that the failure of the Government to pay this bond in gold when presented March 11, 1935, invalidated the call; that the condition upon which interest was to cease was that six months' notice be given and that the bonds be redeemed when presented, in United States gold coin of the former standard of value, and that, inasmuch as this condition was not fulfilled, interest did not cease; (4) that the action of Congress in refusing to permit the payment of gold coin and attempting to invalidate the Government's obligation to pay in such coin, coupled with the refusal of the Treasurer to pay this bond and former coupons in gold coin constituted a repudiation of the Govern- [fol. 18] ment's obligation on the bond and that, while such repudiation continued, the Government could not assert an option given it against the plaintiff to redeem the bond; (5) that the call issued in Treasury Department Circular 501 on October 12, 1933, was void ab initio, for the reason that in view of the action of Congress and the President in requiring all gold to be delivered to the United States, which action was taken prior to June 1933, and in view of the joint resolution of June 5, 1933, the call was an attempt to call these bonds by the payment of currency.

Plaintiff seeks to recover interest and its case rests upon a contractual obligation. At the outset it should be noted

that the United States is not liable for interest, except by its express consent by statute or contract, and that its obligation to pay interest in any case is limited strictly to the terms of the statute or contract providing therefor. Plaintiff's bond stated that it was issued pursuant to Treasury Department Circular 121 of September 28, 1918, and incorporated by reference the provisions of that circular. The bond and this circular therefore constitute the Government's contract. In this circular, under the heading "Rate of Interest, Date of Bonds, Maturity and Redemption" is contained the following provision:

"The bonds will mature October 15, 1938, but the issue may be redeemed at the pleasure of the United States on and after October 15, 1933, in whole or in part, at par and accrued interest, on any interest day or days on six months' notice given in such manner as the Secretary of the Treasury shall prescribe * * *. *From the date of redemption designated in any such notice interest on bonds called for redemption shall cease.*" [Italics ours.]

In addition, the Fourth Liberty bond purchased by plaintiff, to which the interest coupon involved in this case was attached, provided that "The United States of America for value received promises * * * to pay interest on said principal sum * * * *until the principal hereof shall be payable.*" [Italics ours.]

[fol. 19] It seems clear to us from the above that by the agreement of the parties the obligation of the defendant to pay interest on the bond ceased upon the issuance of notice of call and passage of time to the date designated for redemption in such notice. It is agreed that a notice of call was issued and a date fixed for redemption prior to the period for which plaintiff is now demanding interest. Moreover, the contract between the parties did not require that there be a redemption of the bond in order that interest on the obligation as such should terminate. It required only the giving of notice of call for redemption, which was admittedly done, and the arrival of the date specified in that notice. This fact and the provision of the bond itself that interest would run only until the principal of the bond should become payable distinguish the case of Sterling v. Watson Co., 241 Pa. 105, and Corbett, Executrix, v. McClintic Marshall Corp., 17 Del. Chan. 165, cited and relied upon by plaintiff.

The clause in the bond in question that the United States will pay interest on the principal of the bond "until the principal hereof shall be payable" clearly discloses that the interest obligation was to run only until the date designated for redemption, namely, when the principal became "payable." It cannot be denied that the principal was payable April 15, 1934. Plaintiff concedes that by virtue of the notice of call for redemption the principal of the bond became payable, but contends that the bond holder also had the option of availing itself of the terms of the call and suing for immediate payment. But the word "payable" does not mean paid.

In Morgan v. United States, 113 U. S. 476, it was held that the purchase of bonds of the United States after the redemption date was not, under the circumstances, a purchase of discredited paper within the usual rules relating to negotiable instruments, and the court said "The legal effect of the call undoubtedly is to entitle the holder to demand payment at its maturity and, even though not demanded to exonerate the Government from liability for interest accruing after that date, * * * the obligation to pay interest ceases because that is the contract to which the holder of the bond has consented, and to which he sub- [fol. 20] mits." See also Perry v. United States, supra; Compania de Inversiones Internacionales v. Mortgage Bank of Finland, 269 N. Y. 22 (certiorari denied); Spaulding v. Lord, 19 Wisc. 533.

The interest coupon sued upon also conditioned the right of the holder to demand interest, upon whether the bond had been called for redemption. This coupon provided as follows: "The United States of America will pay to bearer on October 15, 1934, at the Treasury Department, Washington, or at a designated agency, $1.07, being six months' interest then due on $50, 4th Liberty Loan 4¼% Gold Bond of 1933-1938, unless called for previous redemption."

It seems clear from what has been said above that in order for plaintiff to recover it would be necessary for the court to ignore the specific and positive provisions of the contract relating to the matter of interest. But plaintiff insists that because the principal of the bond was not paid in gold and that inasmuch as the defendant, at the time the call was issued, intended to redeem the bond in coin or currency of the United States, the call was void and of no effect

and that the obligation of the United States to pay interest continued until maturity of the bond. With this we cannot agree. The nature of the call conformed to the requirements of the statute and of the bond, and the action taken by the United States on the date when the principal of the bond became payable under the call, or when it was presented for redemption, which plaintiff claims was not in accordance with the obligation assumed by the United States in the bond, may have given rise to a cause of action with respect to the principal or accrued interest (Perry v. United States, supra; Nortz v. United States, 294 U. S. 317, 328); but any failure of the United States to comply with the contract with respect to payment of the principal of the bond in gold did not change or modify the specific terms of the agreement with respect to interest subsequent to April 15, 1934. Morgan v. United States, supra.

In Machen v. United States, decided June 20, 1936, the District Court for the District of Maryland, denied interest in a case similar to the one at bar, holding that the United States had an unqualified right to call the bond for redemption in accordance with the provision in the bond [fol. 21] to which the plaintiff must be deemed to have agreed upon its purchase, and that if the plaintiff considered himself injured, by the Government's failure to redeem by payment in gold, his only remedy was to bring suit upon the principal obligation of the bond.

In a proper case a plaintiff might be entitled to demand interest at the legal rate rather than the contract rate after a bond has been called for redemption and after the principal has become payable. Spaulding v. Lord, supra. But this suit is not and cannot be a suit for legal interest for the reason that an obligation of the United States to pay interest can only arise by its own express consent and contract. United States v. North Carolina, 136 U. S. 211.

Under the terms of the contract involved in this case and upon the facts of record, we are of opinion that plaintiff is not entitled to recover, and its petition is dismissed. It is so ordered.

Whaley, Judge; Williams, Judge; Green, Judge; and Booth, Chief Justice, concur.

[fol. 22] VII. JUDGMENT

At a Court of Claims held in the City of Washington on 9th day of November A. D., 1936, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law, that the plaintiff is not entitled to recover.

It is Therefore Adjudged and Ordered that the plaintiff's petition be and the same is hereby dismissed.

VIII. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On January 8, 1937, the plaintiff filed a motion for a new trial.

On January 8, 1937, the defendant filed a motion to amend the special findings of fact.

On February 8, 1937, the court entered the following order on said motions:

Order

It is Ordered this 8th day of February, 1937, that the plaintiff's motion for new trial and the defendant's motion to amend the special findings of fact, be and the same are hereby overruled.

[fol. 23] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 41,501. Court of Claims. Term No. 961. The Dixie Terminal Company, petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed May 7, 1937. Term No. 961, O. T., 1936.

[fol. 24] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—*Filed June 1, 1937*

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S
FILED
MAY 7 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. [redacted] 43

THE DIXIE TERMINAL COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

ROBERT A. TAFT,
Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 961

THE DIXIE TERMINAL COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Your petitioner, The Dixie Terminal Company, prays that a writ of certiorari be issued to the Court of Claims of the United States to review the judgment of that court in the above entitled action, and respectfully shows to this Honorable Court:

Judgment Below.

Judgment of the Court of Claims was entered on November 9, 1936. Motion for a new trial was filed January 8, 1937, and was overruled on February 8, 1937.

Statement of the Case.

Suit was instituted in the Court of Claims by the petitioner, an Ohio corporation, as the owner, holder for value,

and bearer of a Fourth Liberty Loan 4¼% Gold Bond in the principal amount of $50.00, to recover $1.07, either in gold coin or legal-tender currency, on the interest coupon due October 15, 1934, attached to such bond. The bond of the petitioner bore the serial number A00055321, and was by its terms redeemable at the pleasure of the United States on or after October 15, 1933, at par and accrued interest, on any interest date or dates. By the express terms of the bond, the principal and interest thereof were payable in United States gold coin of the standard of value as of the date of issue. On October 12, 1933, the Secretary of the Treasury, by Department Circular 501, purported to issue a notice of call for redemption on April 15, 1934, of that part of the Fourth Liberty Loan issue in which the final digit serial numbers were 9, 0 or 1, thus including the petitioner's bond.

On March 11, 1935, petitioner duly presented its bond to the respondent, and demanded payment in gold dollars of the standard of value of the date of issuance, but the respondent refused to redeem the bond except by the payment of $50.00 in legal-tender currency. The offer of the Government was refused by the petitioner, who thereafter on the same day presented the interest coupon due October 15, 1934, attached to said bond, and demanded payment of the amount thereof, $1.07, either in gold coin or legal-tender currency. The respondent refused payment on the ground that the bond had been called for redemption on April 15, 1934. Upon such refusal by the respondent to pay the October 15, 1934, interest coupon, the petitioner filed suit on March 11, 1935, in the Court of Claims to recover in legal-tender currency (not in gold coin) the amount of such interest coupon.

Question Presented.

Whether interest ceases to run on a bond of the United States, payable in gold coin of the standard of value in ef-

fect October 24, 1918, when the Secretary of the Treasury on October 12, 1933, issues a purported call for redemption on April 15, 1934, but refuses to pay the bond except in legal-tender currency.

Reasons for the Allowance of the Writ.

1. *The Court of Claims decided the question involved in this case in a way which does not give proper effect to the decision of this Court in the case of Perry* v. *United States,* 294 U. S. 330.

In that case this Court held unconstitutional the Joint Resolution of June 5, 1933, which attempted to provide that obligations of the United States, payable in gold coin, might be discharged by the payment of currency. It is true that the Court held that the bondholder failed to prove any damages from failure to pay gold—in short, that the remedy sought was defective for an unquestioned legal right. In this case the bondholder does not seek payment in gold, but insists upon his right to receive interest on his bond until its maturity, unless the Government complies with its legal obligation to pay gold.

2. *The decision of the Court of Claims is squarely in conflict with the decision of the Fourth Circuit Court of Appeals in a case involving the same issue with respect to an interest coupon on a First Liberty Loan Bond; Machen* v. *United States,* 87 F. (2d) 594.

In this case Judge Parker, writing the opinion for the Court of Appeals, rejects the reasoning and conclusions of the Court of Claims. He says:

> "The argument of the government and the decision of the Court of Claims in *Dixie Terminal Co.* v. *United States,* — Ct. Cl. —, to which our attention is called proceed upon the theory that the provision of the bond

providing for notice, upon which interest is to cease and coupons subsequently maturing are to become void, is to be construed as though it were independent of the provision for redemption which it follows, i.e. that a notice is sufficient which states that the bonds will be redeemed on the named date, even though it does not say or mean to say that they will be redeemed in accordance with their terms. We think that the position is unsound and that, under the decision in the *Morgan case, supra,* the provision as to notice must be construed as a part of the provision for redemption."

3. *The question raised by this case is of great public and general interest.*

After the passage of the Joint Resolution of June 5, 1933, and before and after the decision of this Court in the *Perry* case, the Secretary of the Treasury has attempted to call all gold-clause bonds which could be called in advance of their maturity, amounting to more than eight billion dollars. The list includes:

Fourth Liberty Loan Bonds called for April 15, 1934	$1,875,000,000
Fourth Liberty Loan Bonds called for October 15, 1934	1,250,000,000
Fourth Liberty Loan Bonds called for April 15, 1935	1,870,000,000
Fourth Liberty Loan Bonds called for October 15, 1935	1,250,000,000
First Liberty Loan Bonds called for June 15, 1935	1,929,915,000
2% Consols of 1930 called for July 1, 1935	599,724,000
2% Panama Canal Bonds called for August 1, 1935	74,901,000
Total	$8,849,540,000

Other such gold-clause bonds are outstanding, not callable at this time, but callable in the future, an attempt to

call which may be made. The question involves directly the credit of the United States and the sanctity of its contracts. It involves a construction of various statutes of the United States relating to the calling of bonds which have never been construed. The question raised herein has never been passed upon by this Court; its character demands that it should be.

Conclusion.

For the reasons herein set forth, it is respectfully submitted that this petition should be granted.

ROBERT A. TAFT,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinion Below.

One opinion was delivered by the Court of Claims. It was written by Judge Littleton and filed November 9, 1936. It appears at page 14 of the Record, and is reported in 83 Ct. Cls. 656. No opinion was delivered by the Court in denying the motion for a new trial.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229 (43 Stat. 939, 28 U. S. C. A. § 288).

The judgment of the Court of Claims was entered on November 9, 1936, a motion for a new trial was filed January 8, 1937, and was overruled on February 8, 1937 (R. 18). The petition herein was filed on May 7, 1937.

Chronological Statement of Documents, Statutes, Proclamations and Circulars Involved.

Petitioner is the owner and holder for value of a United States Fourth Liberty Loan Bond reading as follows:

"$50 $50 A00055321*.

Fourth Liberty Loan.

4¼% Gold Bond of 1933-1938.

The United States of America for value received promises to pay to the bearer the sum of Fifty Dollars on October 15, 1938, and to pay interest on said principal sum at the rate of four and one-quarter per cent per annum from the date hereof on April 15 and October 15 in each year until the principal hereof shall be payable upon presentation and surrender of the interest coupons as they severally mature, at the Treasury De-

partment, Washington, or at the holder's option, at any agency or agencies in the United States which the Secretary of the Treasury may from time to time designate for the purpose. The principal and interest hereof are payable in United States gold coin of the present standard of value. This bond is one of a series of four and one-quarter per cent gold bonds of 1933-1938 authorized by an Act of Congress approved September 24, 1917, as amended and issued pursuant to Treasury Department Circular No. 121, dated September 28, 1918, to which reference is hereby made for a statement of the further rights of the holders of bonds of said series as fully and with the same effect as if herein set forth. All or any of the bonds of said series may be redeemed at the pleasure of the United States, on and after October 15, 1933, at par and accrued interest as in said circular provided. This bond does not bear the circulation privilege.

Washington, October 24, 1918.

Recorded: J. O.

W. G. McAdoo,
Secretary of the Treasury.

Houston B. Teehee,
Register of the Treasury.

Act approved September 24, 1917, as amended."

(Eight coupons, April 15, 1935, to October 15, 1938, attached.)

The interest coupon attached to petitioner's bond, payable October 15, 1934, reads as follows:

"The United States of America

will pay to bearer on October 15, 1934, at the Treasury Department, Washington, or at a designated agency, $1.07, being six months' interest then due on $50 Fourth Liberty Loan 4¼% Gold Bonds of 1933-1938 unless called for previous redemption.

A00055321*. (32.)

Houston B. Teehee,
Register of the Treasury."

The relevant portion of Treasury Department Circular 121, under which petitioner's bond was issued, reads:

> "TREASURY DEPARTMENT,
> Office of the Secretary,
> Washington, September 28, 1918.
>
> The Secretary of the Treasury invites subscriptions, at par and accrued interest, from the people of the United States for $6,000,000,000 of United States of America Four and One-Quarter Per Cent Gold Bonds of 1933-1938 * * *. The bonds will mature October 15, 1938, but the issue may be redeemed at the pleasure of the United States on and after October 15, 1933, in whole or in part, at par and accrued interest, on any interest day or days, on six months' notice given in such manner as the Secretary of the Treasury shall prescribe. In case of partial redemption the bonds to be redeemed will be determined by such method as may be prescribed by the Secretary of the Treasury. From the date of redemption designated in any such notice, interest on bonds called for redemption shall cease. The principal *and interest of the bonds* are payable in United States gold coin of the present standard of value."

Fourth Liberty Loan Bonds were issued under the Act of September 24, 1917 (40 Stat. at L. 288, c. 56, U. S. C., Title 31, § 752) as amended by the Act of April 4, 1918 (40 Stat. at L. 502, c. 44, § 1) and the Act of July 9, 1918 (40 Stat. at L. 844, c. 142, § 1), the pertinent provisions of which read as follows:

> "The Secretary of the Treasury, with the approval of the President, is authorized to borrow, from time to time, on the credit of the United States * * * not exceeding in the aggregate $20,000,000,000, and to issue therefor bonds of the United States * * *."
>
> "The bonds herein authorized shall be in such form or forms and denomination or denominations and subject to such terms and conditions of issue, conversion,

redemption, maturities, payment, and rate or rates of interest, not exceeding 4¼ per centum per annum, and time or times of payment of interest, as the Secretary of the Treasury from time to time at or before the issue thereof may prescribe. The principal and interest thereof shall be payable in United States gold coin of the present standard of value."

At the time of passage of the Act of September 24, 1917, and its amending statutes, and at the time the Fourth Liberty Loan Bonds were issued, there was in effect the Act of March 14, 1900 (31 Stat. at L. 45, c. 41, § 1), defining the gold content of the dollar, and reading as follows:

> "The dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity."

Under the authority of the Emergency Banking Act passed on March 9, 1933, the President on April 5, 1933, issued Executive Order No. 6102, prohibiting the hoarding of gold, and requiring all persons to deliver all gold coin, gold bullion, and gold certificates owned or acquired by them to the Government, and accept legal-tender currency therefor.

On May 12, 1933, Congress passed, and the President approved, the Agricultural Adjustment Act of May 12, 1933, authorizing the President, among other things, to reduce the gold content of the dollar.

On June 5, 1933, the Congress of the United States adopted a Joint Resolution (48 Stat. at L. 113, c. 48, U. S. C., Title 31, § 463), which reads as follows:

> "Provision for payment of obligations in gold prohibited; uniformity in value of coins and currencies.

(a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this section, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency), payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve Banks and national banking associations."

On August 28, 1933, the President promulgated Executive Order No. 6260, requiring every person owning gold coin, gold bullion, or gold certificates to make a return to the Secretary of the Treasury, and prohibiting the acquisition of any such gold without license and the holding of any such gold without license after thirty days from the date of the order, under penalty of fine and imprisonment.

On October 12, 1933, the Secretary of the Treasury issued Treasury Department Circular No. 501, purporting to call the petitioner's bond for redemption, the pertinent part of which reads as follows:

"TREASURY DEPARTMENT,
Office of the Secretary,
Washington, October 12, 1933.

To Holders of Fourth Liberty Loan 4¼ per cent Bonds of 1933-38, and Others Concerned:

1. NOTICE OF CALL FOR PARTIAL REDEMPTION OF FOURTH LIBERTY LOAN 4¼ PER CENT BONDS OF 1933-38 (FOURTH 4¼'s) BEFORE MATURITY.

1. Pursuant to the provision for redemption contained in the bonds and in Treasury Department Circular No. 121, dated September 28, 1918, under which the bonds were originally issued, all outstanding Fourth Liberty Loan 4¼'s, bearing the serial numbers which have been determined by lot in the manner prescribed by the Secretary of the Treasury, are called for redemption on April 15, 1934, as follows:

All outstanding permanent coupon bonds bearing serial numbers the final digit of which is 9, 0, or 1, such serial numbers being prefixed by a corresponding distinguishing letter J, K, or A, respectively;
All outstanding temporary coupon bonds bearing serial numbers the final digit of which is 9, 0, or 1; and
All outstanding registered bonds bearing serial numbers the final digit of which is 9, 0, or 1.

2. Interest on all such outstanding Fourth 4¼'s so called for redemption will cease on said redemption date, April 15, 1934."

On January 30, 1934, the Gold Reserve Act of 1934 (Act of January 30, 1934, 48 Stat. at L. 340, c. 6) became law. Section 5 of such Act reads:

"No gold shall hereafter be coined, and no gold coin shall hereafter be paid out or delivered by the United States: Provided, however, That coinage may continue to be executed by the mints of the United States for foreign countries in accordance with the Act of January 29, 1874 (U. S. C., Title 31, Sec. 367). All gold

coin of the United States shall be withdrawn from circulation, and, together with all other gold owned by the United States, shall be formed into bars of such weights and degrees of fineness as the Secretary of the Treasury may direct."

On January 31, 1934, the President issued a Proclamation (48 Stat. at L. 1734), the relevant provisions of which are:

> "Now, therefore, be it known that I, Franklin D. Roosevelt, President of the United States, by virtue of the authority vested in me by section 43, title III of said act of May 12, 1933, as amended, and by virtue of all other authority vested in me, do hereby proclaim, order, direct, declare, and fix the weight of the gold dollar to be 15-5/21 grains nine tenths fine, from and after the date and hour of this proclamation. The weight of the silver dollar is not altered or affected in any manner by reason of this proclamation."

Petitioner's bond was not presented for payment on April 15, 1934, but after the decision of this Court in the *Perry* case on February 18, 1935, it was presented for payment on March 11, 1935, and payment demanded in gold coin in accordance with its terms. The respondent refused to pay gold on the ground that the Treasury was forbidden to pay out gold; and refused to redeem the bond except in legal-tender currency. Thereupon petitioner presented the interest coupon due October 15, 1934, on which this suit is brought, and demanded payment either in gold coin or in legal-tender currency. Payment was refused on the ground that interest had ceased to run on April 15, 1934.

On August 27, 1935, Congress adopted a Joint Resolution withdrawing the consent of the United States to the assertion against it of any right, privilege or power "upon any gold-clause securities of the United States, or for interest thereon". Since this action was taken after the deci-

sion of this Court that the Government's obligation to pay gold was valid, this Joint Resolution is clearly a reaffirmation of the Government's refusal to pay gold, and of its intention to redeem the called bonds in currency only. However, the Resolution expressly provides that the section shall not apply "to any proceeding referred to in this section in which no claim is made for payment or credit in an amount in excess of the face or nominal value in dollars of the securities, coins or currencies of the United States involved in such proceeding". Since this and similar suits only claim the face or nominal value in dollars of the coupon sued upon, the Resolution does not apply in any way to this kind of a suit.

ARGUMENT.

Summary.

1. THE PROVISIONS OF THE BOND AND CIRCULAR WITH RESPECT TO PAYMENT IN GOLD COIN ARE VALID UNDER THE PERRY DECISION, AND NOT BY THE LEGISLATION ADOPTED BY CONGRESS.

2. THE PURPORTED CALL ON OCTOBER 12, 1933, WAS VOID, BECAUSE IT WAS A CALL FOR PAYMENT IN CURRENCY, AND NOT IN ACCORD WITH THE TERMS OF THE BOND.

3. REGARDLESS OF THE VALIDITY OF THE PURPORTED CALL, THE RUNNING OF INTEREST ON PETITIONER'S BOND DID NOT CEASE ON APRIL 15, 1934, BECAUSE THE UNITED STATES WAS NOT READY AND WILLING AT THAT TIME, OR AT ANY TIME, TO REDEEM ITS BOND IN ACCORDANCE WITH ITS TERMS.

4. THE PURPORTED CALL ISSUED ON OCTOBER 12, 1933, WAS VOID, BECAUSE THE SECRETARY OF THE TREASURY HAD NO AUTHORITY TO ISSUE A CALL WITHOUT FURTHER ACTION BY CONGRESS.

5. THE PURPORTED CALL ISSUED ON OCTOBER 12, 1933, WAS VOID BECAUSE FORBIDDEN BY SECTION 731 OF TITLE 31 OF THE UNITED STATES CODE (ACT OF MARCH 18, 1869, 16 STAT. 1).

1. The provisions of the bond and circular with respect to payment in gold coin are valid under the Perry decision, in spite of the legislation adopted by Congress.

In the case of *Perry* v. *United States*, 294 U. S. 330, this Court held that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation to pay in gold coin created by the Fourth Liberty Loan Bonds, went beyond the congressional power. Chief Justice Hughes, delivering the opinion of the Court, said:

> "The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power *vital to the Government*—upon which in an extremity its very life may depend. The *binding quality* of the promise of the United States is of the essence of the credit which is so pledged. Having this power *to authorize the issue of* definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy these obligations. The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and despite infirmities of procedure, remains binding upon the conscience of the sovereign."

In view of this decision, there can be no doubt that the Government was obligated to pay the petitioner's bond in gold coin of the former standard of value. The lack of remedy and failure of proof found to exist in the *Perry* case is not material here, because the petitioner is not suing for gold, and is not seeking damages for failure to pay gold, but is merely claiming the right to interest until maturity, or until the bond is called and paid in accordance with the admitted obligation of the Government. Although the Government is legally and morally obligated to pay this bond

in gold, it is now trying to redeem the bond, and to pay that bond immediately in a depreciated currency. If the Government had to pay the bond in gold, it would never have called the bond. It is only because it desires to take advantage of its repudiation, and because of the difficulty of the bondholder securing any remedy against that repudiation, that the effort is made to pay in advance of maturity. It may be that at maturity, if the Government maintains its position, and no further change is made in the monetary policy or the value of gold, the petitioner will have to accept currency in payment of the bond, but in the meantime we submit that it may collect interest in legal-tender currency, unless the Government is willing to redeem the bond in accordance with its terms.

2. The purported call on October 12, 1933, was void, because it was a call for payment in currency, and not in accord with the terms of the bond.

The purported call for redemption issued by the Secretary of the Treasury on October 12, 1933, did not state in what medium the bonds would be redeemed or paid on April 15, 1934. The Court of Claims apparently rested its decision on its belief that a notice of call was actually issued, and stated that "It is agreed that a notice of call was issued and a date fixed for redemption prior to the period for which plaintiff is now demanding interest". We respectfully submit that it is not agreed that a notice of call was issued. Our position is that under the law existing on October 12, 1933, Congress and the President had clearly provided that all persons, including the United States, might pay their obligations in currency. Under the authority of the Emergency Banking Act, the President had issued executive orders making it illegal to hoard gold, and requiring every holder of gold to deliver such gold to the Government. Under the Agricultural Adjustment

Act, the President had been authorized to change the value of the gold dollar. Prior to October, 1933, the Government had entered upon a gold-purchasing program, by which the price of gold had been daily increased. Certainly it would have been illegal for the Secretary of the Treasury to pay out gold in redemption of Government Bonds. If it was illegal for the Secretary of the Treasury to pay out gold, it was certainly illegal for him to call the bonds for payment in gold. The Secretary of the Treasury, of course, was entirely subject to the will of Congress. If he had any authority to call bonds in gold at all, it existed under the statutes of Congress, and could not exist at all in the face of the Emergency Banking Act and the Agricultural Adjustment Act. The call, therefore, can only be construed as a call for payment in currency.

The Government was obliged to pay the bonds in gold under the holding of this Court in the *Perry* case. A call for payment in currency was just as void as a call for payment of the bond by paying fifty per cent of its face amount, or a notice of redemption in real estate or corporate stocks or silver bullion. This call must certainly be interpreted in the light of the existing statutes, and so interpreted it was a direct notice from the Government that it desired and intended to redeem the bonds in legal-tender currency, and not in accordance with their terms.

This is no imaginary argument. When the call was issued, everybody in the United States knew exactly what was intended. Congress had repeatedly declared its intention of abandoning gold and paying in currency. No official of the Government, no holder of any bond, had the slightest idea that the notice of call meant anything except a call to pay in currency. In fact, the Secretary of the Treasury would never have called the bonds if he had the slightest expectation of having to pay in gold.

Our position is supported by the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Machen* v. *United States of America*, 87 F. (2d) 594 at p. 597. Judge Parker said:

> "It would hardly be contended that a notice to the effect that the government would redeem the bonds at 59 cents on the dollar would be a sufficient notice under the bond to stop the running of interest and avoid the subsequently maturing coupons; but it will be seen that this is precisely what the notice as published means when the acts of Congress and the presidential proclamation affecting the currency are read into it, and when it is remembered that Congress is without power to abrogate the gold clause as contained in obligations of the Government. • • •
>
> It follows that, because of the legislation and the presidential proclamation to which we have referred, the Secretary of the Treasury was without power, both at the time of the publication of the notice and at the time fixed for redemption, either to pay gold on the gold clause bonds or to pay in paper money the value of the gold which they promised. He was consequently without power under the law to redeem these gold clause bonds at their face value; and the notice of redemption which he issued must be construed in the light of this lack of power."

3. Regardless of the validity of the purported call, the running of interest on petitioner's bond did not cease on April 15, 1934, because the United States was not ready and willing at that time, or at any time, to redeem its bond in accordance with its terms.

The Government relies on that sentence in the Circular of September 28, 1918, which states that "From the date of redemption designated in any such notice, interest on bonds called for redemption shall cease". But surely this does not mean that interest shall cease on the mere issue of

a call, without intention or ability to redeem the bonds on the call date. Analyzing the situation, it would appear that interest on called bonds ceases (1) if proper notice of redemption is given, and (2) if on presentation the bond is paid in accordance with its terms, or would be so paid if presented. It can hardly be contended that the call itself is the only condition upon which interest ceases. If a corporation calls bonds, and then fails to have the money on hand to redeem the bonds in accordance with the call, the holder of such bonds surely has the option of retaining his bonds until maturity and collecting interest. It is possible that he also has the option of availing himself of the terms of the call, and suing for immediate payment, on the ground that the debtor has estopped itself from denying the validity of the call.

The necessary and logical conclusion from the Government's position is that under the terms of the bond the Government could call a bond without the slightest intention of paying it, and thereby cause interest to stop running. In the *Perry* case, this Court insisted on the sacredness of the Government's obligations. The construction of the obligation insisted on by the Government would enable it to cancel its sacred obligations.

In the case of *Sterling* v. *H. F. Watson Company*, 241 Pa. 105, 88 Atl. 297 (1913), the defendant attempted to call its preferred stock by the payment of its par value and accrued dividends, which it was entitled to do, but attempted to deduct from the accrued dividends the par value of a twenty-five per cent stock dividend which had been distributed eight years before. The stockholder sued to restrain the company from stopping dividends after the call date, and from refusing to transfer the stockholder's stock. The Supreme Court of Pennsylvania held that the twenty-five per cent stock dividend could not be considered under the terms of the preferred stock redemption clause,

and granted the stockholder's petition, requiring the company to treat the plaintiff as a stock-holder by transferring his stock, and to continue the payment of semi-annual dividends until a call was issued strictly in accordance with the terms of the redemption clause.

In *Corbett, Executrix,* v. *McClintic-Marshall Corporation,* 17 Delaware Chancery 165 (1930), the directors of the company exercised their charter right to redeem complainant's preferred stock, but complainant contended that the price at which they proposed to redeem was not the correct price. On demurrer, the Chancellor held that the petition stated a proper cause of action, but that the complainant was not entitled to insist on cash redemption at the higher price which she claimed, because this was within the discretion of the board of directors, a discretion which they had not exercised. The Court held, however, that she was entitled, if she proved her case, to retain the status of a preferred stockholder. The Court said, on page 171:

> "In view of the fact that the bill shows that the defendant has notified the complainant in substance that she is to be denied the status of a preferred stockholder in the future, the nature of the case, if the complainant be right in her claims touching the alleged illegality of the proposed redemption, requires a decree that although she cannot on the facts alleged enforce a redemption in accordance with her specific prayers, yet the defendant is bound to treat her as a preferred stockholder until proper redemption of her stock has been effected."

It is well settled that holders of bonds without a call provision cannot be made to accept payment in advance of maturity; *Chicago, etc., Railroad Co.* v. *Pyne,* 30 Fed. 86; *Missouri Railroad Co.* v. *Union Trust Co.,* 156 N. Y. 592, 51 N. E. 309. A statute providing that payment must be accepted before maturity is unconstitutional; *Randolph* v.

Middleton, 26 N. J. Equity 543. Surely an effective call cannot be issued unless it is followed by a tender of the money either to a trustee or paying agent in the case of a private corporation, or direct to the bondholder in the case of the United States. As the Court of Appeals of New York said, in the case of *Missouri Railroad Co.* v. *Union Trust Company:*

> "They (the bondholders) have the right to have their bonds redeemed only according to the contract, and unless they are so redeemed, to hold them and draw interest upon them until the day of payment shall arrive."

We respectfully call the Court's attention to the English case of *Gordillo* v. *Weguelin*, 5 Chancery Division 287 (1877), in which the question of cessation of interest was discussed. In that case a mortgage indenture provided that the debtor would pay interest and five per cent of the principal sum semi-annually. Provision was made that a certain amount of bonds should be drawn for redemption on May first and November first of each year, to be redeemable on the following June first and December first, respectively. The indenture then provided: "but no interest shall be payable on any drawn bond after the date fixed for its redemption." The debtor having defaulted, the trustees took possession after certain bonds had been drawn and called, but before they had been redeemed. The question arose whether the holders of bonds drawn for redemption, but whose bonds the trustee was unable to pay, were entitled equally with holders of undrawn bonds to receive interest. The court held, despite the words quoted above, that interest continued to accrue on the drawn bonds, because they had not been paid on the date fixed for redemption, and that such interest had the same status under the terms of a deed of trust as interest on the undrawn bonds. Lord Justice James said:

"I am of opinion that upon the whole deed what was intended was that interest should run until the bond was paid, or until it was payable according to the terms of the deed, that is de facto payable out of funds provided for that purpose. When the bonds were in truth payable, not payable in the sense of the money being recoverable in an action at law, or anything of that kind, but payable by reason of the fund being provided for the purpose of paying them, either in the hands of the contractors or received by the trustees, then the interest would cease, and until it was so payable in truth and in fact, as well as in legal right of action, the interest runs."

The Court of Claims relies on the promise in the bond to pay interest "until the principal hereof shall be payable", and states that the word "payable" does not mean "paid". We submit that the phrase "until the principal becomes payable" is a stock phrase employed by generations of bond draftsmen, and means simply that the bond will bear interest until maturity. We call the Court's attention to the opinion of this Court in the case of *Morgan* v. *United States*, 113 U. S. 476, in which the Court quoted from earlier decisions in which a distinction was made between the words "redeemable" and "payable", and in which it was pointed out that bonds do not become payable until the maturity date, although they may under their terms be redeemable prior to such date. Of course any court would hold that after actual redemption in accordance with the terms of the bond, or tender of such redemption, interest would cease. But we do not agree that on April 15, 1934, the bond became payable under the circumstances existing in this case; it simply became redeemable.

The truth is that when the bond was drafted no one contemplated the possibility of repudiation by the United States, and no provision was made in the bond to cover

such a contingency. As stated by Mr. Justice Strong in *United States* v. *Sherman*, 98 U. S. 565 at pp. 567-568:

> "Delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes."

As is pointed out in 50 *Harvard Law Review*, 986, the interpretation of the Circuit Court of Appeals in the *Machen* case seems more in accord with the intent of the parties. The Liberty Bonds drafted by officials of the Government must be construed most strongly against it. No one purchasing a Liberty Bond considered the possibility of the United States repudiating its obligations.

4. The purported call issued on October 12, 1933, was void, because the Secretary of the Treasury had no authority to issue a call without further action by Congress.

As pointed out on pages 8-9, the Fourth Liberty Loan Act authorized the Secretary of the Treasury to prescribe the terms of redemption of bonds issued under such Act. Under such broad authority, the Secretary of the Treasury might have prescribed any one of several methods for issuing a notice of call. He actually did prescribe that the Fourth Liberty Loan Bonds should be redeemable at the pleasure of the United States. In the case of *Morgan* v. *United States*, 113 U. S. 476, Mr. Justice Matthews, writing the opinion for this Court, referred to the provision as to calling bonds there involved, and stated:

> "The pleasure of the Government to redeem them or any part of them, of course, could only be declared by law. Provision to this effect was made by the Act of July 14, 1870."

We respectfully submit that the conclusion of this Court in that case was correct. There is no more reason why the pleasure of the Secretary of the Treasury should be the

pleasure of the United States than the pleasure of the President, or of the Vice-President, or any other officer of the Government. The redemption of bonds is a major financial transaction, requiring the consideration of Congress. The Secretary of the Treasury Department, between October 12, 1933, and August 1, 1935, determined to call nearly nine billion dollars in bonds payable in gold, at a time when the terms of the bonds could not be complied with. The policy followed involved a repudiation by the Government of its solemn obligations declared to be such by this Court in the case of *Perry* v. *United States*, 294 U. S. 330. Certainly no one would maintain that an individual, holding an appointed office in a government founded on the theory of popular representation and control, would have the right to obligate the country for nine billion dollars. We submit that he has no greater right to exercise the pleasure of the United States in repudiating obligations incurred on the authorization of Congress.

5. The purported call issued on October 12, 1933, was void because forbidden by Section 731 of Title 31 of the United States Code (Act of March 18, 1869, 16 Stat. 1).

Section 731 of Title 31 of the United States Code was passed originally in 1869, and incorporated into the Revised Statutes as Section 3693. It provides:

> "None of the interest-bearing obligations not already due shall be redeemed or paid before maturity, unless at such time United States notes are convertible into coin at the option of the holder, or unless at such time bonds of the United States bearing a lower rate of interest than the bonds to be redeemed can be sold at par in coin."

The reason for this passage of this law was obviously to prevent the Government from doing just what it is attempting to do now—paying off its obligations to its bondholders in a

depreciated currency. United States notes, or "greenbacks", were, of course, at a considerable discount from gold in 1869, and were not redeemable in gold or silver coin at that time. In order to protect the bondholders, Congress provided that none of the interest-bearing obligations should be redeemed or paid before maturity as long as United States notes were not convertible into coin at the option of the holder. Never on March 1, 1933, nor at any subsequent date have United States notes been convertible into coin at the option of the holder. The Government, and not the holder, has the option, and it may pay out currency of any kind for any United States notes presented.

The proviso at the end of Section 731 was intended to permit the redemption of bonds if the Government is in a position to sell its bonds and receive gold for them, even though they bear a lower rate of interest. If the bonds bearing a lower rate of interest can only be sold for currency, then no call can be made. It is obvious that Government Bonds, when this call was issued in 1933, could not be sold for gold coin. There was no gold coin except in minor hoards, and if anyone could lawfully have obtained gold, he would not have paid gold for United States Bonds, whether on their face they were payable in gold or in currency. It is suggested that United States Bonds might have been sold for silver coin. Obviously the Government has never sold bonds and required payment in silver coin, and it is not a practical operation. There is not enough silver coin in the country to pay for an issue as large as the Fourth Liberty Loan issue called. The silver coin not in the Treasury is required for ordinary change throughout the country. Furthermore, the silver coin has a purely fictitious value in excess of the value of the silver contained in such coins, and in effect is nothing but subsidiary currency. In 1869 it might have been possible for the Government to sell gold bonds and require payment in gold coin, thus obtaining the gold coin

necessary to redeem the prior issue, but since the validity of the gold clause is in doubt, such bonds cannot be sold today.

We respectfully submit that Section 731 was intended to prevent exactly what the Government is now trying to do.

Conclusion.

We submit that the decision of the Court of Claims denies "the validity of the public debt of the United States, authorized by law," and makes a mockery of the power of Congress "to borrow money on the credit of the United States."

Respectfully submitted,

ROBERT A. TAFT,
Attorney for Petitioner.

(9032-C)

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 961

THE DIXIE TERMINAL COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE RESPONDENT

The respondent joins with the petitioner in its request that a writ of certiorari herein be granted. While it is believed that the conclusion reached below is correct, the respondent agrees that the matter in controversy should be reviewed by this Court because, as stated in the petition, the question raised is of public importance and there exists a conflict between the decision of the court below and that of the Circuit Court of Appeals for the Fourth Circuit in the case of *Machen* v. *United States,* 87 F. (2d) 594 (decided January 15, 1937, petition for rehearing denied April 6, 1937).

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Accordingly, respondent, without concurring in the remaining statements of fact and law contained in the petition and supporting brief, nevertheless joins with the petitioner in requesting that a writ of certiorari be issued to the Court of Claims of the United States to review the judgment of that court in the above-entitled cause.

Respectfully submitted.

STANLEY REED,
Solicitor General.

MAY 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 42

JAMES D. SMYTH, EXECUTOR OF THE ESTATE OF JAMES J. RANSOM, DECEASED, PETITIONER

v.

THE UNITED STATES

No. 43

THE DIXIE TERMINAL COMPANY, PETITIONER

v.

THE UNITED STATES

No. 198

THE UNITED STATES, PETITIONER

v.

ARTHUR W. MACHEN

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS RESPONDENT IN NOS. 42 AND 43, AND PETITIONER IN NO. 198

OPINIONS BELOW

The opinion of the Court of Claims in *Smyth* v. *United States* (No. 42) is not yet reported (R. 19–25).

The opinion of the Court of Claims in *Dixie Terminal Co.* v. *United States* (No. 43) is reported in 83 C. Cls. 656 (R. 14–17). The motion of the Dixie Terminal Company for a new trial and the motion of the United States for amendment of the special findings of fact were overruled without written opinion (R. 18).

The memorandum opinion of the District Court of the United States for the District of Maryland *in United States* v. *Machen* (No. 198) is not reported (R. 14). The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 27–32) is reported in 87 F. (2d) 594. The petition of the United States for a rehearing was denied without written opinion (R. 33).

JURISDICTION

The judgment of the Court of Claims in the *Smyth* case (No. 42) was entered May 3, 1937 (R. 25). The petition for a writ of certiorari was filed May 7, 1937, and was granted June 1, 1937.

The judgment of the Court of Claims in the *Dixie Terminal Co.* case (No. 43) was entered November 9, 1936 (R. 18). A motion for a new trial was overruled February 8, 1937 (R. 18). The petition for a writ of certiorari was filed May 7, 1937, and was granted June 1, 1937.

The judgment of the United States Circuit Court of Appeals was entered January 15, 1937 (R. 32). The petition of the United States for rehearing

was denied April 6, 1937 (R. 33). The petition for a writ of certiorari was filed July 6, 1937, and was granted October 11, 1937.

The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939; and on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, 939.

QUESTION PRESENTED

Whether the plaintiffs, as owners of Liberty Loan Bonds which have been the subject of a notice of call for redemption, are entitled to recover the amount of an interest payment for a period subsequent to the date of redemption designated.

STATUTES INVOLVED

The pertinent provisions of the Act of April 24, 1917 (40 Stat. 35), and of the Act of September 24, 1917 (40 Stat. 288, as amended), pursuant to which the First and Fourth Liberty Loan Bonds involved herein were issued, are printed, *infra*, pp. 48, 49. These cases may be said, in addition, to involve the monetary legislation of Congress in 1933 and 1934, particularly that legislation which is concerned with the regulation of the value of all coins and currency, with "gold clause" obligations, and with the restrictions upon the use of gold coin.

Act of May 12, 1933, c. 25, 48 Stat. 31, 51–53;

Public Resolution No. 10, approved June 5, 1933, c. 48, 48 Stat. 112;

Gold Reserve Act of 1934, approved January 30, 1934, c. 6, 48 Stat. 337.

STATEMENT

No. 42

The petitioner in No. 42 as executor is the owner of a $10,000 First Liberty Loan 3½% Bond of 1932–1947, serial number 6670. This bond was issued pursuant to the Act of April 24, 1917 (40 Stat. 35) and Treasury Department Circular No. 78, dated May 14, 1917 (R. 7–8), and was purchased by the petitioner in December 1934 for the sum of $10,362.50 and accrued interest (R. 16). The bond (R. 5–7) in part provides:

> The United States of America for value received promises to pay to the bearer the sum of Ten Thousand Dollars on the 15th day of June, 1947, with interest at the rate of three and one-half per centum per annum payable semi-annually on December 15 and June 15 in each year until the principal hereof shall be payable, upon presentation and surrender of the interest coupons hereto attached as they severally mature. The principal and interest of this bond shall be payable in United States gold coin of the present standard of value, * * *. All or any of the bonds of the series of which

> this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, on any semi-annual interest payment date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date and published thereafter from time to time during said three months' period as the Secretary of the Treasury shall direct. * * * From the date of redemption designated in any such notice, interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void. * * *

Department Circular 78 in part provided:

> The bonds will be dated June 15, 1917, and will bear interest at the rate of 3½ per centum per annum from that date, payable semiannually on December 15 and June 15. The bonds will mature June 15, 1947, but the issue may be redeemed on or after June 15, 1932, in whole or in part, at par and accrued interest, on three months' published notice, on any interest day; in case of partial redemption the bonds to be redeemed to be determined by lot by such method as may be prescribed by the Secretary of the Treasury.

On March 14, 1935, the Secretary of the Treasury published a notice of call for the redemption on June 15, 1935, of First Liberty Loan bonds of 1932–1947 (R. 9). This notice of call provided in part as follows:

Public notice is hereby given:

1. All *outstanding First* Liberty Loan bonds of 1932–47 are hereby called for redemption on June 15, 1935. The various issues of First Liberty Loan bonds (all of which are included in this call) are as follows:

First Liberty Loan 3½ percent bonds of 1932–47 (First 3½'s), dated June 15, 1917; * * *

2. Interest on all such outstanding First Liberty Loan bonds will cease on said redemption date, June 15, 1935.

On April 22, 1935, the Secretary of the Treasury issued Department Circular No. 535, which contained the above mentioned notice of call, and prescribed rules for the redemption of First Liberty Loan bonds. This circular (R. 10–14) contained the following language:

III. *Rules and regulations governing redemption of First Liberty Loan bonds*

Pursuant to the call for redemption, as set forth in Section I of this circular, the following rules and regulations are hereby prescribed to govern the presentation and surrender of First Liberty Loan bonds for redemption on June 15, 1935:

1. *Payment of called bonds on June 15, 1935.*—Holders of any outstanding First Liberty Loan bonds will be entitled to have such bonds redeemed and paid at par on

June 15, 1935, with interest in full to that date. After June 15, 1935, interest will not accrue on any First Liberty Loan bonds.

The First Liberty Loan bond owned by the petitioner is one that was included in the above notice of call for redemption.

On December 28, 1935, the petitioner presented the bond to the Treasurer of the United States and demanded the redemption of the bond by payment of 10,000 gold dollars, each containing 25.8 grains of gold, .9 fine. This demand was refused by the Treasurer, but the petitioner was offered payment of the dollar face amount of the principal of the bond in legal tender coin or currency. Petitioner refused to accept such legal tender coin or currency and retained the bond (R. 17).

Thereafter, on the same day, petitioner presented to the Treasurer of the United States the interest coupon for the six months' period June 15 to December 15, 1935, and demanded payment thereof in the sum of $175 in gold coin or legal tender currency. The Treasurer refused payment on the ground that the bond had been called for redemption on June 15, 1935 (R. 17).

Petitioner did not on December 28, 1935, or at any time hold a Federal license to acquire, hold, or dispose of gold coin or gold bullion, and was not engaged in any business in which the use of gold coin or gold bullion was necessary (R. 18).

The petitioner purchased this bond from a bank, and payment therefor was effected by entering a debit against petitioner's account with that bank in a dollar amount equal to the purchase price (R. 16). Had the petitioner on December 28, 1935, when he presented the bond to the Treasurer of the United States for payment, received ten thousand dollars in gold coin, it was his purpose and intention to send the gold coin to this bank as a *routine deposit* for which he would have received in his dollar account a credit of $10,000 (R. 16).

On December 28, 1935, and thereafter, petitioner owed no obligation and incurred no expenses which could not have been liquidated in legal tender currency other than gold coin, and there was no investment which petitioner might have made in the United States with $10,000 in gold coin that he could not equally as well have made with $10,000 in legal tender currency (R. 18–19).

No. 43

The petitioner in No. 43 is the owner of a $50 Fourth Liberty Loan 4¼% bond of 1933–1938, serial number A00055321. This bond was issued pursuant to the Act of September 24, 1917 (40 Stat. 288), as amended, and Treasury Department Circular No. 121, dated September 28, 1918, and was purchased by the petitioner on March 9, 1935, eleven months after the date of redemption as hereafter set forth, for the sum of $51.75 and

accrued interest (R. 11). Payment was made for the bond by New York draft payable in dollars (R. 11). The price paid was in excess of the market value of the bond, which was par (R. 11). The bond (R. 5–6) in part provides:

> The United States of America for value received promises to pay to the bearer the sum of—Fifty Dollars—on October 15, 1938, and to pay interest on said principal sum at the rate of four and one-quarter per cent per annum, from the date hereof, on April 15 and October 15 in each year until the principal hereof shall be payable, upon presentation and surrender of the interest coupons as they severally mature, * * *. The principal and interest hereof are payable in United States gold coin of the present standard of value. This bond is one of a series of four and one-quarter per cent gold bonds of 1933–1938 authorized by an act of Congress approved September 24, 1917, as amended, and issued pursuant to Treasury Department circular No. 121, dated September 28, 1918, to which reference is hereby made for a statement of the further rights of the holders of bonds of said series as fully and with the same effect as if herein set forth. All or any of the bonds of said series may be redeemed, at the pleasure of the United States, on and after October 15, 1933, at par and accrued interest, as in said circular provided. * * *

Department Circular No. 121 (R. 6–7) in part provided:

> The bonds will mature October 15, 1938, but the issue may be redeemed at the pleasure of the United States on and after October 15, 1933, in whole or in part, at par and accrued interest, on any interest day or days, on six months' notice given in such manner as the Secretary of the Treasury shall prescribe. In case of partial redemption the bonds to be redeemed will be determined by such method as may be prescribed by the Secretary of the Treasury. From the date of redemption designated in any such notice, interest on bonds called for redemption shall cease.

On October 12, 1933, the Secretary of the Treasury published a notice of call for the redemption on April 15, 1934, of certain Fourth Liberty Loan 4¼% bonds of 1933–1938 (R. 8–9). This notice of call provided in part as follows:

> Public notice is hereby given:
>
> 1. Pursuant to the provision for redemption contained in the bonds and in Treasury Department Circular No. 121, dated September 28, 1918, under which the bonds were originally issued, all outstanding Fourth Liberty Loan 4¼ per cent bonds of 1933–1938, hereinafter referred to as Fourth 4¼'s, bearing the serial numbers which have been determined by lot in the manner prescribed by the Secretary of the Treasury,

are called for redemption on April 15, 1934, as follows:

All outstanding permanent coupon bonds bearing serial numbers the final digit of which is 9, 0, or 1, such serial numbers being prefixed by a corresponding distinguishing letter J, K, or A, respectively; * * *

2. Interest on all such outstanding Fourth 4¼'s so called for redemption will cease on said redemption date, April 15, 1934.

On October 12, 1933, the Secretary of the Treasury issued Department Circular No. 501, which contained the above-mentioned notice of call, and prescribed rules for the redemption of Fourth Liberty Loan bonds. This circular (omitted from the record) contained the following language:

IV. *Rules and regulations governing redemption*

Pursuant to the call for partial redemption, as set forth in Section I of this circular, the following rules and regulations are hereby prescribed to govern the surrender of Fourth 4¼'s called for redemption on April 15, 1934:

1. *Payment of called bonds on April 15, 1934.*—Holders of any outstanding Fourth 4¼'s included in the call for partial redemption on April 15, 1934, will be entitled to have their bonds redeemed and paid at par on April 15, 1934, with interest in full to that date. After April 15, 1934, interest

will not accrue on any bonds included in the call for partial redemption.

The Fourth Liberty Loan bond owned by the petitioner is one that was included in the above notice of call for redemption.

On March 11, 1935, two days after the purchase of the bond (R. 11, 13), the petitioner presented it to the Treasurer of the United States and demanded the redemption of the bond by the payment of 50 gold dollars, each containing 25.8 grains of gold, .9 fine. This demand was refused, but the respondent was ready and willing to make full payment at par in coin or currency of the United States legal tender (R. 13). Petitioner, thereupon, refused to accept payment for the bond at par in legal tender currency and retained the bond (R. 13).

Thereafter, on the same day, petitioner presented to the Treasurer of the United States the interest coupon for the six months' period ending October 15, 1934, and demanded payment thereof in the sum of $1.07 in gold coin or legal tender currency. The Treasurer refused payment on the ground that the bond had been called for redemption on April 15, 1934 (R. 13). This suit was filed the same day.

Petitioner was not engaged or authorized to engage in any business in which gold coin or gold bullion was necessary for its operation (R. 11). On March 11, 1935, it held no license authorizing

it to receive or hold gold coin or gold bullion (R. 13).

No. 198

The respondent in No. 198 is the owner of a $1,000 First Liberty Loan 3½% bond of 1932–1947, No. 47084, purchased on March 22, 1933, for $1,011.25 (R. 19). This bond was issued and called for redemption under the same circumstances as the First Liberty Loan 3½% bond of 1932–1947 involved in case No. 42 (R. 13–18).

The respondent did not surrender or offer to surrender or present for payment his bond, but it has been stipulated that upon proper presentation and surrender of all First Liberty Loan 3½% bonds the United States redeemed them by the payment of legal tender currency equal to the face amount of the bonds and that the Treasury Department refused to pay gold coin therefor (R. 11).

The *interest coupon in controversy* in the sum of $17.50 was *not* surrendered *or* presented for payment but it has been stipulated that the payment of similar interest coupons has been refused by the Treasury Department (R. 11).

The respondent held no license to acquire, transport, melt or treat, import, export, or earmark or hold in custody for foreign or domestic account, gold in any form on March 6, 1933, *or* at any time subsequent to that date (R. 10).

These three suits, Nos. 42, 43, and 198, were brought to recover upon alleged interest obligations

for the six months' period following the dates designated for the redemption of the bonds. In No. 42 suit was instituted in the Court of Claims on December 31, 1935, and judgment was rendered against the petitioner on May 3, 1937. In No. 43 suit was instituted in the Court of Claims on March 11, 1935, and judgment was rendered against the petitioner on November 9, 1936, and a motion for a new trial was overruled on February 8, 1937. In No. 198 suit was instituted in the District Court of the United States for the District of Maryland on December 30, 1935, and judgment was entered against the respondent on June 23, 1936, but this was reversed by the United States Circuit Court of Appeals for the Fourth Circuit on January 15, 1937. A petition for rehearing was denied on April 6, 1937.

SPECIFICATION OF ERRORS TO BE URGED IN NO. 198

The United States urges that the Circuit Court of Appeals for the Fourth Circuit erred:

1. In failing to hold that the principal of the bond became payable on June 15, 1935, the date designated in the notice of call for redemption, and that the Government's obligation to pay interest then ceased.

2. In holding that the notice of call for redemption was not sufficient to stop the running of interest on the bond after June 15, 1935, the date designated in the notice of call for redemption.

3. In holding that respondent, who at no time has held a license to acquire, hold, or deal with United States gold coin, was entitled to recover interest after the date designated in the notice of call for redemption.

4. In reversing the judgment of the District Court and holding that the respondent was entitled to recover.

SUMMARY OF ARGUMENT

I

The bondholders rest their case upon a contractual obligation. By the terms of the agreement between the parties the obligation to pay interest upon the bonds was specifically to cease upon the issuance of a public notice calling the bonds for redemption and the passage of time to the date designated in such notice. Since this condition has occurred the contractual obligation of the Government to pay interest has terminated.

The issuance of a notice of call for redemption in the usual form, operated to create, and was intended to create, the same right to payment assured by the bonds themselves. That the call was effective to entitle the bondholders to demand payment of the principal amounts of their bonds is established by the decision in *Perry* v. *United States*, 294 U. S. 330. By the same token the call was effective to terminate the obligation to pay interest. The suggestion that the bondholders may have an option to demand payment of the principal or to

sue for interest has no basis in the contract and, if accepted, would introduce confusion in public and private finance. Termination of the obligation to pay interest was not conditioned upon actual performance of the principal obligation. Imposition of this additional condition by implication would be unwarranted by judicial authority and would defeat by indirection the rule that interest is not allowed on claims against the Government in the absence of specific statutory authorization.

The terms of the Acts of Congress pursuant to which the bonds were issued, as well as the bonds themselves, establish the authority of the Secretary of the Treasury to issue the notice of call which terminated the obligation to pay interest. This authority has been recognized and confirmed by other legislation of the Congress.

The Act of March 18, 1869, does not affect the validity of the calls for redemption. Examination of the purposes and circumstances surrounding the enactment of that statute establishes that it was intended to apply only to Government bonds then outstanding and that it ceased to have significance when the Government, in 1879, resumed specie payments on its United States notes and maintained all coins and currencies at a parity of value. Even if the validity of the calls for redemption here involved were to be tried by the requirements of that Act, however, the conclusion would be compelled that these requirements have been fully met.

II

The contention that the United States has failed to tender the performance due under the bonds appears to rest exclusively upon its refusal to make payment in gold dollars, "each containing twenty-five and eight-tenths grains of gold, nine-tenths fine." For a double reason this contention cannot be supported. The gold clause in the plaintiffs' bonds is not a promise for payment solely in gold coin, but a promise to pay the value of gold coin. *Perry* v. *United States, supra.* Under the *Perry* decision, no claim of breach of the bond is maintainable which does not allege and prove also a failure to pay the equivalent in value of the gold coin. Even if the gold clause could properly be construed as promising payment in gold coin itself, however, the *Perry* decision does not warrant an assumption that the failure to make such payment, under the circumstances there and here presented, would constitute a breach of obligation. The power of the Congress to prohibit payment of gold coin from the Treasury is an essential aspect of its power "to deal with gold coin as a medium of exchange", and has received ample recognition in the decisions of this Court.

Even if the bondholders were in a position here to urge that the failure of the United States to pay them a number of dollars in legal tender currency in excess of the face amount of the bonds consti-

tuted a breach of contract, no such contention would be tenable. The assertion of the Circuit Court of Appeals in No. 198 that the dollars stated in the bonds were each "worth" 1.69 dollars in legal tender currency is in direct conflict with the decision of this Court in *Perry* v. *United States, supra,* which flatly rejected any method of computing equivalence or worth mathematically, in accordance with the ratios of the statutory gold content of the past and present dollars, regardless of actual loss. The maintenance of all forms of money at a parity in the economy of the country, this Court there held, precluded such a method of computation.

III

Nothing short of a position of material and present default on the part of the United States would in any event warrant the effort here made to work a forfeiture of the option of redemption. So long as the bondholders have been tendered the substantial equivalent of the performance due, no equitable ground can be urged for disregarding the express terms of the bonds and of the calls for redemption. Nor do intimations that the position of the United States, which under the circumstances now existing has been held to be correct, might under different circumstances be incorrect, afford a ground in these cases for forfeiture of its option of redemption. In claiming such a forfeiture, the bondholders are, in effect, insisting

upon payment of an uncontemplated premium, consisting of the added capital value of their bonds under present rates of interest. Acceptance of their contention would jeopardize huge savings of interest effected by refunding operations in recent years. In thus interfering with the sound administration of the public debt, it would tend to restrict the very power which—in the opinion in the *Perry* case upon which the bondholders rely—it was deemed necessary to protect.

IV

The bondholders misinterpret the statements in the opinion delivered by the Chief Justice in the *Perry* case reflecting upon the constitutionality of the Joint Resolution of June 5, 1933. If those statements mean that borrowing contracts of the United States may not in any fashion be affected by a subsequent exercise by Congress of the monetary power, they should be reconsidered, since by the settled doctrines of this Court they were not made under such circumstances as to constitute a precedent. The principle that governmental action taken in pursuance of sovereign governmental powers may affect rights arising out of transactions entered into between the Government and private individuals may justly be considered a postulate of American public law. It seems clear, however, that the statements in question were made in answer to a contention, which the Government

was understood as making, importing that Congress is free to disregard the obligations of the Government at its discretion. The Government is bound, under the law, upon its contracts as individuals are bound. Far from asserting that Government contracts may not be affected as individual contracts are affected by a subsequent exercise of general legislative power, the opinion delivered by the Chief Justice recognizes and reaffirms the principle that they may be so affected

ARGUMENT

To the extent that these cases may involve a constitutional question, they present the problem of harmonizing two great constitutional powers of the Federal Government—the power to regulate the monetary system and the power to borrow money. So much was broadly true also in *Perry* v. *United States,* 294 U. S. 330. But these cases present a further and significant aspect of the borrowing power not there involved—namely, the power to manage the public debt. The preliminary questions of the law of contracts here raised—of the construction and operation of redemption provisions common to both public and private long-term obligations—themselves involve conclusions of the utmost importance to that power.

These issues both of contract and of constitutionality must of necessity be viewed in the context of relevant considerations of national policy. The

factual and economic background of the Government's exercise of control over gold which is here involved was fully presented to this Court in the "gold clause" cases. The importance of the considerations which motivated the Government's action was there recognized, and the authority of the Government to exercise such control was broadly sustained. *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 295–297, 302–306, 311–316; *Nortz* v. *United States*, 294 U. S. 317, 327–330; *Perry* v. *United States, supra*, at pp. 354–358. The important considerations which make the power of the Government to call its obligations for redemption prior to maturity (the exercise of which power is challenged by these bondholders) essential to the proper management of the public debt, however, were not presented or considered in those cases. Accordingly, the Government believes it desirable to outline such considerations at some length.

THE ROLE OF CALLABLE BONDS IN PUBLIC FINANCE

Bonds with optional call periods at present constitute, and for many years have constituted, valuable and important instruments of public finance. As of the most recent dates for which information is available, approximately 90 per cent of the long term interest-bearing public debt of the United States, 90 per cent of the long term internal debt of Great Britain, and a very large percentage of

the long term internal debt of France,[1] consisted of securities redeemable at the option of the respective issuing governments prior to their final dates of maturity, or, in the case of perpetual annuities, redeemable either at the present or after some definite date in the future.

The use of callable bonds has characterized American public finance from the beginning.[2] The loan negotiated from Holland in 1784 by the Government acting under the Articles of Confederation was callable at our option prior to its final maturity; and the loans negotiated from Holland and Antwerp in 1791 by the new Government organized under the Constitution were similarly callable. From this beginning to the present time, whenever the public debt has been of any magnitude, callable bonds have been an important component of the total, and the few occasions when their use has been neglected have, for the most part, been subsequently regretted.

The United States Government in making its earliest bond issues callable prior to their final maturity and in continuing the use of this type of instrument throughout our whole national history,

[1] These figures exclude United States Treasury Notes, Certificates of Indebtedness and Bills; British Treasury Bills and Ways and Means Advances; and French floating, short-term and medium-term debt. Data does not permit the ascertainment of the exact percentage of callable debt in the case of France.

[2] A complete list of Government obligations which have contained redemption provisions is set out in Appendix A, pp. 104–108.

has followed the precedent set by the leading financial powers. Such securities, in a rudimentary form, were used by many European countries during the Middle Ages, and by the eighteenth century the greater part of the debt of Great Britain consisted of redeemable bonds in essentially their modern form. It was one of the financial reforms of Napoleon to fund more than sixty smaller loans into a single issue of redeemable Rentes. Great Britain profited from the prior inclusion of optional call provisions in her bonds, as early as 1717, when the rate of interest on the public debt was reduced from 6 per cent to 5 per cent by a conversion operation. Subsequent important conversions, made during the eighteenth and nineteenth centuries whenever periods of low interest rates permitted, resulted in converting the bulk of the British debt by 1888 into bonds bearing 2¾ per cent interest, until 1903, and 2½ per cent interest thereafter. The French Government also effected material savings during the nineteenth century by the calling of bonds prior to maturity, the interest on a large portion of the debt being reduced from 5 per cent to 3½ per cent between 1883 and 1894 by this method. In 1932 Great Britain undertook and successfully completed the most important single operation of this kind ever undertaken when she converted approximately £2 billions of the 5 per cent War Loan into 3½ per cent Conversion Loan. This operation—made possible only by the

prior inclusion of a callable provision in the bonds—not only effected an annual saving of about £30 millions in interest on the public debt, but opened the way for a corresponding reduction in the rates at which private debtors were able to borrow. In the opinion of many economists, it was a vital factor in promoting and bringing about the British recovery from the depression.

The long continued use of callable bonds by so many governments indicates their value as instruments of public policy.[3] The reasons for this widespread use of callable bonds revolve around the variability and difficulty of prediction of interest rates, on the one hand, and the corresponding variability and difficulty of prediction of government receipts and expenditures, on the other.

The interest rate commanded by long-term obligations fluctuates widely. The chart printed as Appendix B, pp. 109–110, *infra,* shows the average annual yields on British Consols from 1790 to 1936, inclusive, on French Rentes from 1825 to 1936, inclusive, on high-grade American railroad bonds from 1857 to 1919, inclusive, and on long-term

[3]Adam Smith had advocated their use before the foundation of the American Republic, while Professor Henry C. Adams, the dean of our own writers on public finance, criticized the Refunding Act of 1870 because it did not take sufficient advantage of the use of optional call periods, and strongly urged that they be availed of to the utmost extent. *Wealth of Nations*, Book V, c. III. *Public Debts*, pp. 226 ff.

Liberty Loan and Treasury bonds from 1919 to 1936, inclusive.[4] A study of the chart brings out two important factors. First, interest rates fluctuate over a very wide arc. The highest annual average yield on British Consols during the period covered was considerably more than twice the lowest annual average yield (5.9 per cent in 1797 as compared with 2.5 per cent in 1897). Second, high rates have generally prevailed during and immediately following periods of war. Since most governmental debts have also been incurred during time of war, it follows that the greater part of such debts has been incurred during times of very high interest rates.

It is naturally very much to the interest of all governments that debts incurred at high rates of interest during such times be refunded at lower rates, and their burden correspondingly reduced as soon after the passage of the emergency as possible. Secretary Chase recognized this fully at the

[4] The yields on high-grade railroad bonds have been taken as representative of American interest rates during the period prior to 1919, since during most of this period the larger portion of the United States public debt was held by national banks as security for their circulation, and the quotations on United States Government bonds consequently were not representative of conditions in the money market generally or of the rates at which the Government could have borrowed any amount of money greatly in excess of the amount of bonds required by the national banks for this purpose.

beginning of our Civil War, and in his Annual Report for 1861–1862 said:

> No prudent legislator * * * will consent to impose on the labor and business of the people a fixed interest of six per cent on a great debt, for twenty years, unless the necessity is far more urgent than is now believed to exist. *The country has already witnessed the results of such* measures in the payment, in 1856, *of more* than four and a *half millions of dollars* for the privilege of paying a debt of less than forty-one millions, some twelve years, averaged time, before it became due.[5]

The wisdom of Secretary Chase's policy in this respect and the potential costliness of the opposite policy is indicated by his reference to the four and *a half millions of dollars* premium paid in 1856 for the redemption prior to maturity of bonds which had carried no callable clause upon original

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[5] In his Annual Report for 1862–3, Secretary Chase added: "The object of future controllability has had a prominent place in the regards of the Secretary * * * As soon as permitted by circumstances, (he) recommended the enactment of laws authorizing the issue of bonds payable after short periods * * * In harmony with these views Congress provided for the issue of the bonds known as the five-twenties.

"The Secretary availed himself of this legislation by placing with the people as large an amount as possible of five-twenty bonds, and by using the other powers so as to put the whole debt * * * in such a shape that prompt advantage can be taken of favorable circumstances to diminish the burdens it imposes on industry."

issuance.[6] The error which Secretary Chase avoided was in fact made, although on a smaller scale and in degree rather than in kind, by the Refunding Act of 1870, which provided for the refunding of a large amount of the war debt into 4 per cent bonds not callable for 30 years. During the fiscal years 1889 to 1891 the Treasury paid premiums aggregating $48 millions for the retirement prior to its first optional redemption date of $270 millions principal amount of debt, an expense which could have been avoided by a more judicious use of optional call periods in the post-war refunding operations.[7]

During the World War, interest rates were again very high and the Treasury again sought to reduce the ultimate cost of the War by the insertion of optional call periods in the war loan bonds. As of August 31, 1919, when the war debt stood at its peak, approximately 75 per cent of the total debt then outstanding, issued subsequent to March 31, 1917, and having a maturity of more than one year, provided for an optional call period prior to its final maturity. As a consequence of these call provisions, the Government has been enabled to save very substantial amounts of interest by redeeming this debt prior to maturity and replacing it with issues bearing a lower rate of interest.

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[6] See D. R. Dewey, Financial History of the United States (12th ed., 1934), pp. 255–256.

[7] Dewey, *op cit.*, pp. 429–431.

The operations just cited involved for the most part the refunding of war debts in times of peace. Reference to the chart, *infra,* pp. 109–110, indicates clearly, however, that interest rates fluctuate very materially even during times of peace, and the range of fluctuation and the great difficulty of predicting changes in the interest rate, even in such times, clearly shows *the unwisdom,* from the standpoint of changes in interest rates alone, of incurring at any time a commitment to pay a fixed rate of interest indefinitely into the future without reserving the right of redemption in the event of a substantial fall in the rate of interest. As a matter of fact, both the United States and foreign countries have made substantial savings by refunding in times of peace, debts also incurred in times of peace.

The reasons so far cited for the inclusion of call periods in the governmental debt have been concerned with fluctuations in the rate of interest. Of perhaps equal importance, are fluctuations in and the uncertainty of prediction of governmental receipts and expenditures, and hence of surpluses and deficits. If it were possible to forecast accurately these surpluses and deficits, it would also be possible to arrange a maturity schedule of the public debt, so that the maturities in each year could be taken care of with the surplus revenues of the same year. It is in practice impossible, however, to arrange such a schedule, since estimates of revenues and expenditures for half a

generation, or even half a decade hence, are subject to extremely wide margins of error. If these errors are resolved on the "safe side" and maturities are kept very small, the Treasury may be embarrassed by a surplus of funds and find it necessary to purchase public debt in the open market at large premiums, as was actually the case during the two periods of American history previously cited.[8] If, on the other hand, the doubts are resolved the other way, and the annual maturities are made large, the Treasury may be even more badly embarrassed by a shortage of funds and find it necessary to borrow at high rates of interest to refund maturing bonds bearing low rates. Any maturity schedule of noncallable bonds is almost certain to run afoul of one or the other of these difficulties; and, even if it should by great good luck avoid them, would probably still cost dearly in lost opportunities for the reduction of interest charges.[9]

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[8] For two other such periods (1806–11 and 1829), see Adams, *op. cit.*, pp. 225–6.

[9] Optional call periods have, of course, a wide use, and for similar reasons, in private finance. On December 31, 1934, the funded debt of industrial, public utility, and street railway corporations registered (or temporarily exempt) under the Securities Exchange Act of 1934 totaled approximately $8,361,000,000. Of this amount, about one-half, or approximately $4,152,000,000, consisted of obligations dated prior to June 5, 1933, which were still outstanding and not due on April 30, 1937. Of this latter amount, approximately $3,774,000,000 (89.9 percent) contain provisions authorizing redemption prior to maturity. On or about December 31, 1936, there were outstanding at least $5,851,000,000 of steam

The use of optional call periods has permitted the Treasury to provide for these contingencies. If these call provisions should be rendered nugatory, the balance already achieved in these respects would be destroyed.

The fact that a decision favorable to these bondholders would constitute a serious interference with the power to manage the public debt, a power essential to the proper exercise of the borrowing power, is particularly apparent when consideration is given to the large amounts of Government "gold clause" obligations which have been called for redemption since 1933, and to the almost equally large amounts of such obligations which are still outstanding and uncalled. Since 1933 "gold clause" obligations of the United States in the aggregate amount of $8,850,072,430 have been called for redemption prior to maturity. The computed interest on such obligations from the dates fixed for their redemption to the dates of maturity specified therein totals $1,871,603,255.27. Obligations of this kind in the aggregate amount of $70,500,420 were still outstanding on June 30, 1937.

The aggregate amount of First and Fourth Lib-

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railroad bonds containing callable provisions, which were dated prior to June 5, 1933. A general examination of the issues appears to indicate that most corporate bonds dated prior to June 5, 1933, contained "gold clauses."

erty Loan bonds (to which classes of obligations the bonds here involved belong) called for redemption since 1933 is approximately $8,175,446,800. Of this amount $6,948,333,550 has been refunded by the exchange of such bonds for other obligations of the United States. The interest saving (from the call dates to the maturity dates of the First and Fourth Liberty Loan bonds) effected by this refunding operation is approximately $552,707,592.75. The possible interest saving which might have been effected by a refunding of all of the First and Fourth Liberty Loan bonds called for redemption into obligations maturing on the respective final maturity dates of such Liberty Loan bonds is estimated at approximately six hundred eighty-nine millions.

It is obvious that a decision favorable to the bondholders in the present cases challenging the validity of this refunding and retirement of a large part of the public debt would seriously affect Government financial operations even if such decision were limited to a holding that those persons who have not yet surrendered their bonds are entitled to retain them and receive interest thereon. Such a decision, it should be noted, would mean that the Government could not validly redeem the Consols of 1930 unless it were prepared to pay them in gold coin, because such bonds had no definite maturity dates. Consols of 1930 in the amount of

$599,724,050 were called for redemption on July 1, 1935. On June 30, 1937, Consols of this kind in the amount of $3,009,450 were still outstanding, and as a result of such a decision would become perpetual annuities.

The effect of such a decision as an interference with the power to manage the public debt is even more apparent when it is viewed in relation to the large number of "gold clause" public debt obligations which contain a redemption privilege, but which have not yet become callable. On June 30, 1937, obligations of this kind in the aggregate amount of $5,255,877,980 [10] were outstanding. The computed interest from the call dates of such obligations to the dates of maturity is in excess of a billion dollars.[11] The possible consequences of a decision of this Court which would prevent the retirement or refunding of such obligations until the Government paid them in gold

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[10] *United States gold clause public debt obligations outstanding June 30, 1937*

[As shown by Treasury Daily Statement]

Pre-War Loans: 2½% Postal Savings Bonds (13th to 44th Series) maturing serially, July 1, January 1, 1937–1953, redeemable on and since January 1, 1934		$45,043,980
Treasury Bonds:		
4¼'s of 1947–52	$758,955,800	
4's of 1944–56	1,036,702,900	
3¾'s of 1946–58	489,080,100	
3⅜'s of 1943–47	454,135,200	
3⅜'s of 1940–43	352,993,450	
3⅜'s of 1941–43	544,870,050	
3⅛'s of 1946–49	818,627,000	
3's of 1951–55	755,469,500	
		5,210,834,000
		5,255,877,980

coin or, in any event, until the maturity of the obligations are evident. It is equally apparent that payment of such obligations in gold coin might seriously interfere with Government monetary policies.

Having reviewed the considerations of financial policy which render the exercise of the power to call obligations for redemption of such tremendous importance to the Government, we turn to inquire whether any considerations of the law of contracts or of statutory interpretation, or any constitutional principle, require a conclusion that the power in these cases *did not* exist.

I

THE OBLIGATION OF THE UNITED STATES TO PAY INTEREST HAS TERMINATED, SINCE THE CONDITION UPON WHICH INTEREST WAS TO CEASE HAS OCCURRED

The bondholders rest their case upon a contractual obligation. The relevant provisions of the

[11] *Interest rate on long-term Treasury bonds issued since April 15, 1934*

	Date of Issue	Redeemable (on or after)	Payable	Amount
3¼'s 1944-46	Apr. 15, 1934	Apr. 15, 1944	Apr. 15, 1946	$1,518,858,800
3's 1946-48	June 15, 1934	June 15, 1946	June 15, 1948	1,035,865,050
3¼'s 1949-52	Dec. 15, 1934	Dec. 15, 1949	Dec. 15, 1952	491,377,100
2½'s 1955-60	Mar. 15, 1935	Mar. 15, 1955	Mar. 15, 1960	2,611,156,200
2¾'s 1945-47	Sept. 16, 1935	Sept. 15, 1945	Sept. 15, 1947	1,214,453,900
2¾'s 1948-51	Mar. 16, 1936	Mar. 15, 1948	Mar. 15, 1951	1,223,496,850
2¾'s 1951-54	June 15, 1936	June 15, 1951	June 15, 1954	1,626,688,150
2¾'s 1956-59	Sept. 15, 1936	Sept. 15, 1956	Sept. 15, 1959	981,848,050
2½'s 1949-53	Dec. 15, 1936	Dec. 15, 1949	Dec. 15, 1953	1,786,504,050

bonds held by the claimants in No. 42 (R. 5–6) and No. 198[12] (R. 18–19) are as follows:

> * * * The principal and interest of this bond shall be payable in United States gold coin of the present standard of value * * *. * * * All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, on any semi-annual interest payment

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[12] The provisions of the bond held by the petitioner in No. 43 have only immaterial variations (R. 5–6):

"* * * The principal and interest hereof are payable in United States gold coin of the present standard of value. * * * All or any of the bonds of said series may be redeemed at the pleasure of the United States, on and after October 15, 1933, at par and accrued interest, as in said circular provided. * * *"

The Treasury Circular provides (R. 6, 7):

"* * * The bonds will mature October 15, 1938, but the issue may be redeemed at the pleasure of the United States on and after October 15, 1933, in whole or in part, at par and accrued interest, on any interest day or days, on six months' notice given in such manner as the Secretary of the Treasury shall prescribe. * * * *From the date of redemption designated in any such notice, interest on bonds called for redemption shall cease.* The principal and interest of the bonds are payable in United States gold coin of the present standard of value. [Italics supplied.]

The coupon upon which suit is brought reads as follows (R. 7):

"The United States of America will pay to bearer on October 15, 1934, at the Treasury Department, Washington, or at a designated agency, $1.07, being six months' interest then due on $50 Fourth Liberty Loan 4¼% Gold Bond of 1933–1938 *unless called for previous redemption.*" [Italics supplied.]

> date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date, and published thereafter from time to time during said three months' period as the Secretary of the Treasury shall direct. * * * *From the date of redemption designated in any such notice, interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void.* * * * [Italics supplied.]

These provisions constitute the entire contract between the parties with respect to the matter immediately in controversy. By this agreement the obligation to pay interest on the bonds was specifically to cease upon the issuance of a notice of call and the passage of time to the date designated in such notice.

The provisions in question thus differ from occasional provisions for redemption, conditioned upon actual payment of the obligation. Thus, in *Sterling* v. *H. F. Watson Company,* 241 Pa. 105, the stock certificate provided:

> The stock * * * is subject to the right of the H. F. Watson Company, at its option to retire and extinguish the same *upon the payment* to the owner thereof of all arrears of dividends and the par value * * * [Italics supplied].

The terms of the contract between the United States and these bondholders did not require that

there be a redemption by actual payment in order that the interest on the obligation as such should terminate. They required only the giving of a notice of call for redemption and the arrival of the date specified in that notice. Upon the occurrence of these conditions, two legal consequences followed: the bondholders became entitled to demand payment of the principal amounts of their bonds, and the obligation of the United States to pay interest ceased. By the terms of the contract these two consequences were inseparable.[13] The promise of the bond to pay interest is a promise to pay only "until the principal hereof shall be payable." If words have any meaning, "payable" does not connote "paid."

On March 14, 1935, the Secretary of the Treasury issued the following notice (R. No. 42, 9; R. No. 198, 20–21):[14]

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[13] See *Morgan* v. *United States*, 113 U. S. 476, in which the Court said (at pages 498, 502):

"The legal effect of the call undoubtedly is to entitle the holder to demand payment at its maturity, and, even though not demanded, to exonerate the government from liability for interest accruing after that date * * *.

"* * * the obligation to pay interest ceases because that is the contract, to which the holder of the bond has consented and to which he submits * * *."

[14] The call of the bond involved in No. 43 was as follows (R. 8):

"1. Pursuant to the provision for redemption contained in the bonds and in Treasury Department Circular No. 121, dated September 28, 1918, under which the bonds were originally issued, all outstanding Fourth Liberty Loan 4¼ per

> Public notice is hereby given:
>
> 1. All outstanding First Liberty Loan bonds of 1932–47 are hereby called for redemption on June 15, 1935. * * *.
>
> 2. Interest on all such outstanding First Liberty Loan bonds will cease on said redemption date, June 15, 1935.
>
> 3. *Full information regarding the presentation and surrender of First Liberty Loan bonds for redemption under this call* will be given in a Treasury Department circular to be issued later.

The Treasury Circular, issued on April 22, 1935, stated (R. No. 42, 10–14; R. No. 198, 21–26):

> 1. *Payment of called bonds on June 15, 1935.*—Holders of any outstanding First Liberty Loan bonds will be entitled to have such bonds redeemed and paid at par on June 15, 1935, with interest in full to that date. After June 15, 1935, interest will not accrue on any First Liberty Loan bonds.

It is apparent that the call for redemption was issued in virtually the language of the bonds themselves.[15] These cases are, therefore, unlike the

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cent bonds of 1933–38, hereinafter referred to as Fourth 4¼'s, bearing the serial numbers which have been determined by lot in the manner prescribed by the Secretary of the Treasury, are called for redemption on April 15, 1934, as follows:

* * * * *

"2. Interest on all such outstanding Fourth 4¼'s so called for redemption will cease on said redemption date, April 15, 1934."

[15] Nothing, of course, turns upon the use in the redemption circular of the phrase "at par" rather than the phrase "at

case of *Sterling* v. *H. F. Watson Co., supra,* and other cases cited by the bondholders, in which the call was in terms to pay something less than was due. The calls here in question bound the Government to perform whatever its obligation required it to perform. If, after the call, it had been *determined that* the Government was bound to pay something in excess of the face amount of the bond in legal tender currency or to pay in gold the Government would have been obligated to make such payment.

A. THE CALLS FOR REDEMPTION HERE ISSUED WERE EFFECTIVE TO CREATE THE RIGHT TO PAYMENT ASSURED BY THE BONDS, AND SO TO TERMINATE THE OBLIGATION TO PAY INTEREST

The basic fallacy underlying the theory of the present proceedings is the assumption that an obligor in calling bonds for redemption is bound to take a position upon any controversy concerning its principal liability. In effect, it is insisted that the function of a notice of call for redemption is to define and tender the principal performance due, that its validity depends upon the accuracy of the definition, and that any bondholder who

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face value" as used in the bonds. The two expressions are interchangeable in meaning and, as these records show, the practice of the Treasury Department has been to use them interchangeably. The bond held by the petitioner in No. 43 used the phrase "at par." See note 12, *supra.* So also did the Treasury Circular under which the other bonds were issued (R. No. 42, 8).

disputes the definition is free to attack the call rather than to sue for the principal performance which he conceives to be due. These assumptions appear to be responsible for the effort here made to construe these calls, which admittedly were silent as to the medium of payment (Brief, No. 42, 14), as committing the United States to one mode of performance and one mode only. The contention overlooks the possibility, and the validity, of a call which operates simply to subject the obligor to liability to pay whatever he may be legally obliged to pay.

The Circuit Court of Appeals, in No. 198, stated (R. 29, 30) that the argument of the Government and the decision of the Court of Claims in No. 43 proceed upon the theory that a notice of redemption is sufficient "which states that the bonds will be redeemed on the named date, even though it does not say or mean to say that they will be redeemed in accordance with their terms." This is an incorrect statement of the decision of the Court of Claims and of the position which the Government has taken throughout these cases. Both the Court of Claims and the Government proceed upon the theory that the notice of redemption, which was in the usual form, operated to create, and was intended to create, the same right to payment assured by the bonds themselves; and that it was therefore effective to terminate the obligation to pay interest.

The Circuit Court of Appeals recognized (R. 28) that the notice of call for redemption was in the

usual form and that it would be effective to stop the running of interest (and by the same token to accelerate the principal debt), "except for the legislation of Congress affecting the currency, which limited the power of the Secretary of the Treasury and must be read into the notice." The court stated that the Secretary of the Treasury was allowed to pay Government "obligations in currency only 'dollar for dollar,' notwithstanding such obligations may contain a gold clause," and added (R. 30):

> * * * whatever the validity of the legislation and the proclamation in question, so far as impairing the obligations of the government is concerned, they are unquestionably valid as limitations upon the power of the Secretary of the Treasury.

It is true that the Secretary of the Treasury would not have been authorized, in the absence of an authoritative determination of the rights of the holders, to pay the bonds otherwise than dollar for dollar in legal tender currency. This circumstance, however, in no wise affects the legal obligation previously incurred by the United States. Nor does it affect the power of the Secretary to issue a call which would accelerate that obligation to its full extent under the law. No basis is suggested for questioning the power of the United States to discharge that liability, whatever it should be determined to be. Although the consent

of the United States to be sued is "a matter of procedure which does not affect the legal and binding character" of its obligations (*Perry* v. *United States, supra,* at p. 354; *Lynch* v. *United States,* 292 U. S. 571, 580, 582), the United States in fact was subject to suit upon the bonds to determine any controversy concerning the extent of its liability. Nothing in the monetary legislation in force at the time the calls were issued had the effect of withdrawing the consent of the United States to be sued. Nor is there anything therein to warrant a conclusion that any judgment which might have been rendered against the United States would not have been paid.

That the calls here in question operated to subject the United States to an accelerated liability to the full extent of its obligation, and that the United States was subject to suit upon that obligation, is conclusively established by the decision of this Court in *Perry* v. *United States, supra.* The *Perry* case was a suit for the principal amount of a bond included in the same call as the bond held by the petitioner in No. 43. If, as now suggested, the call was ineffective to create a judicially enforceable obligation against the United States, it is manifest that such a suit could not have been maintained. An attempt is made to distinguish the *Perry* case on the ground that "the question of the validity of the call was not raised in that case and was not considered by the court" (R. 29). But the question of

the existence of any present obligation and of its enforceability lay at the foundation of the plaintiff's cause of action and of the Court's jurisdiction. That it was not "considered" by the Court—that the Court did not dismiss the certificate—signified only that the Court did not consider it debatable.

Nor is the bondholder's present case helped by the implied suggestion that if the question of jurisdiction had been "considered" in the *Perry* case, it would have been necessary to dismiss the proceedings without determination of the merits. Such action would have meant that a claim of breach of obligation of a called bond is self-defeating, since proof of an attempted breach is proof also that the call was ineffectual. The evident injustice and impropriety of such a result, under the then existing legislation of Congress, discloses the error of the argument which would require it.[16]

The provisions for redemption before the Court are to be construed in the same way, and given the same operation, as similar provisions in private

[16] Suits for the principal amounts of United States bonds containing gold clauses are now pending in the district courts and in the Court of Claims, including the original suit of the plaintiff in the *Perry* case, now pending upon an amended petition. These suits were filed prior to the effective date of the Joint Resolution of August 27, 1935, 49 Stat. 939, by which Congress sought to remove uncertainties concerning the fiscal obligations of the United States by imposing, in effect, a limitations period upon further actions based upon gold clauses.

obligations. These provisions are advisedly conditioned upon issuance of a notice of call for redemption, plus the designated passage of time, and *not upon* tender of a particular performance. A call for redemption which operates to subject the obligor to whatever liability the instrument creates is not only proper under *such provisions*, but a construction of the call which gives it that effect ought affirmatively to be favored. For a call which is ineffective to terminate the obligation to pay interest must be ineffective also to accelerate the principal debt. If, therefore, a call is construed as tendering only a particular performance, a different performance cannot be demanded in a direct proceeding to recover the principal debt, since proof of the right to such performance would be proof also that the call was invalid and the debt not yet due. Clarification of the status of called bonds could accordingly be obtained only in proceedings to recover interest payments;[17] and the only result of the obligor's attempted breach, if challenged, would be forfeiture of the option of redemption. The liquidity of the capital market would be materially hampered by such restrictions.

[17] So limited a remedy would constitute a hardship to bondholders. The only incentive to suit for interest payments would be the advantage of retaining a favorable investment, if favorable the investment were. The cost of an unsuccessful suit would be the loss of the use of the principal during the period prior to the date of the next coupon and during the period of the subsequent litigation.

The bondholders seek to escape these consequences of the theory of the present proceedings by suggesting that the obligee may have an option either to sue for interest or to treat the call as effective and sue for the principal payment (Brief, No. 42, 16). The existence of such an option on the part of owners of widely held securities would introduce confusion in public and private finance. Examination of the terms of the bonds will show that the suggestion is without foundation in the agreement of the parties. The suggestion runs counter, moreover, to the holding in *Corbett, Executrix* v. *McClintic Marshall Corp.*, 17 Del. Ch. 165, cited by the petitioners in Nos. 42 and 43, in which it was decided that a call to redeem in one fashion, whether valid or invalid, cannot subject the obligor to liability to redeem in a different fashion.[18] The propriety of such a ruling is evident. The suggestion, in any event, is unavailing in the cases at bar, since the construction of existing legislation relied upon to render the call invalid is a construction which would deprive the courts of jurisdiction to entertain suits for a greater payment than that tendered or, indeed (since it would make the proceedings non-justiciable), for any payment.

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[18] It is argued that the obligor "would be estopped to assert the invalidity of its own call" (Brief, No. 42, 16). Very possibly he would be estopped to refuse the payment which his own call was construed as tendering. No ground is apparent, however, upon which he would be estopped from refusing any *greater or different payment*.

B. CESSATION OF THE OBLIGATION TO PAY INTEREST WAS SUBJECT TO NO OTHER CONDITION THAN THE ISSUANCE OF A VALID CALL FOR REDEMPTION

The bondholders make the further contention that the running of interest did not stop on the date designated for redemption, whatever the validity of the call, because of the alleged failure of performance by the Government at that time. In a contract in which cessation of the obligation to pay interest is expressly conditioned upon the issuance of a call for redemption, and not upon actual performance of the principal obligation, they thus seek to interpolate the additional condition that such performance in fact be made.

Whatever persuasiveness this contention may have derives from its application to a situation different from that before the Court. The supposition is made of a refusal to honor an admitted liability, as in a case in which funds are not on hand to pay a sum concededly due. But even if interest under the contract would continue to run in such a case, it does not follow that, where the extent of the obligation is in dispute and the obligor is subject to suit thereon, the obligee may elect to continue to draw interest merely because the obligor has not yielded to his view of the obligation.

The bondholders' contention is unsubstantiated by any judicial authority, even as applied to a situation of admitted default. The present question, of course, has no relation to the problem of implied

conditions in bilateral contracts which arises when one party, having failed to perform fully, sues to compel performance by the other party, or to recover damages for non-performance. A callable bond is a unilateral contract. The bondholder is subject to no duty of performance. The issue here is not whether a party who is in default can insist on performance by the other party, but whether the party advancing the claim of default, who owes no duty of performance, can, in lieu of bringing suit to settle the claim, insist as an implied condition of the contract upon a performance which has not been promised. The cases cited by the bondholders afford no support for the theory that such an action is maintainable. The cases of *Sterling* v. *H. F. Watson Company,* 241 Pa. 105, and *Corbett, Executrix* v. *McClintic Marshall Corp.,* 17 Del. Ch. 165, both involved calls for redemption which were invalid by the terms of the contract. In the English case of *Gordillo* v. *Weguelin,* 5 Ch. Div. 287, emphasis similarly was placed (p. 296) upon provisions of the contract indicating that deposit of sums for payment was a condition precedent to redemption. The question there at issue was twofold: whether holders of bonds drawn for redemption, but unpaid, were entitled to receive interest after the debtor's failure; and if so, whether they were entitled to share ratably with holders of undrawn bonds. The court was agreed that the holders of drawn bonds were entitled to receive interest

by way of damages. One judge, however, concluded that such claims were inferior to claims for contractual interest. The other two members of the court held that they were on a parity with claims for such interest (pp. 297, 303). They did not hold that the claims in question had the technical status of contractual interest.

Damages or interest at a statutory rate (compare *Spaulding* v. *Lord,* 19 Wis. 533) are the appropriate remedies for non-payment of a debt when due, not disregard of contractual provisions for redemption. The bondholders give no adequate reason for departure from such a rule here. Certainly the fact that interest is not allowed, in the absence of specific statutory authorization, on claims against the Government (*Angarica* v. *Bayard,* 127 U. S. 251, 260; *United States* v. *North Carolina,* 136 U. S. 211; *Seaboard Airline Ry.* v. *United States,* 261 U. S. 299, 304; *United States* v. *North American Co.,* 253 U. S. 330, 336) is not such a reason. The case must be judged according to a rule of law applicable to public and private obligations alike. To do otherwise in this case would be to defeat by indirection the rule concerning interest on Government obligations, and to do so in order to meet a purely hypothetical situation. We submit that the suggestion (Brief, No. 43, p. 19) that "the necessary and logical conclusion from the Government's position is that * * * the Government could call a bond without the slightest

intention of paying it and thereby cause interest to stop running" is unworthy of serious consideration.

C. THE SECRETARY OF THE TREASURY WAS AUTHORIZED TO ISSUE THE NOTICE OF CALL WHICH TERMINATED THE OBLIGATION TO PAY INTEREST

The argument of the petitioners in Nos. 42 and 43 (Brief, No. 43, pp. 23, 24) that the Secretary of the Treasury had no authority to call the bonds for redemption is entirely without merit.

1. The right to call the bonds for redemption before maturity depends, in the first instance, upon the Acts of Congress pursuant to which the bonds were issued. Act of April 24, 1917, 40 Stat. 35 (No. 42); Act of September 24, 1917, 40 Stat. 288, as amended (No. 43). In these statutes Congress departed from its usual prior practice of prescribing most of the terms of the obligations to be issued, and conferred upon the Secretary of the Treasury a broad discretion. The Act of April 24, 1917 provided:

> *The bonds* herein authorized *shall be* in such form and *subject to such terms and conditions of* issue, conversion, *redemption,* maturities, payment, and rate and time of payment of interest, not exceeding three and one-half per centum per annum, *as the Secretary of the Treasury may prescribe.* [Italics supplied.]

To similar effect is the following provision contained in the Act of September 24, 1917, both in its original and amended form:

> *The bonds* herein authorized *shall be* in such form or forms and denomination or denominations and *subject to such terms and conditions of* issue, conversion, *redemption,* maturities, payment, and rate or rates of interest, not exceeding * * * per centum per annum, * * * *as the Secretary of the Treasury from time to time at or before the issue thereof may prescribe.* [Italics supplied.]

The petitioners' contention is built upon the provisions both of the bonds and the issuing circulars which state that the bonds may be redeemed "at the pleasure of the United States." A question is thus raised not of the intention of Congress, as manifested by the statutes, but of the intention of the Secretary of the Treasury in exercising the power conferred upon him. The position is that the intention of the Secretary was to prescribe a procedure contrary to that actually followed. The broad discretionary power conferred by Congress upon him, it is urged, was exercised (although it need not have been) so as to require a further Act of Congress to authorize redemption prior to maturity.

This contention seeks to read into the phrase which creates the option in the obligor a further statement as to the agency through which the option will be exercised. It ignores the additional provision of the bonds and the issuing circular that the pleasure of the United States shall be manifested on notice given in such manner as the Sec-

retary of the Treasury shall prescribe.[19] The petitioners' contention mistakenly conceives of the pleasure of the Secretary of the Treasury, acting in the course of official duty and with authority in the premises, as something necessarily to be distinguished from the pleasure of the United States. The phrase 'at the pleasure of the principal' is an apt description by an agent of a determination to be made by him, pursuant to previous authorization, on behalf of the principal.

The redemption of bonds is no doubt "a major financial transaction" (Brief, No. 42, p. 24). The original Liberty Loan Acts, however, show that it is not one "requiring the consideration of Congress." A degree of promptitude and flexibility of action is manifestly advantageous. To suppose that, Congress having conferred upon the Secre-

[19] The bond in No. 42 provides:

"All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, or on any semi-annual interest payment date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date and published thereafter from time to time during said three months period as the Secretary of the Treasury shall direct."

The provision of the issuing circular, to which the bond in No. 43 refers, was as follows:

"The bonds will mature October 15, 1938, but the issue may be redeemed at the pleasure of the United States on and after October 15, 1933, in whole or in part, at par and accrued interest, on any interest day or days, on six months' notice given in such manner as the Secretary of the Treasury shall prescribe."

tary of the Treasury a broad discretionary power respecting the redemption of bonds, it was the Secretary's intention to require in each case a further Act of Congress, to be followed by a three or six months' notice, is patently absurd.[20]

2. Whatever doubts may exist as to the authority of the Secretary of the Treasury to call bonds for redemption are resolved by other legislation recognizing and confirming that authority:

> VICTORY LIBERTY LOAN ACT, C. 100, SEC. 6, 40 STAT. 1311, AS AMENDED MARCH 2, 1923, C. 179, 42 STAT. 1427, AND JANUARY 30, 1934, C. 6, SEC. 14 (B), 48 STAT. 344
>
> That there is hereby created in the Treasury a cumulative sinking fund for the retirement of bonds and notes issued under the First Liberty Bond Act, the Second Liberty Bond Act, the Third Liberty Bond Act, the Fourth Liberty Bond Act, or under this Act, and outstanding on July 1, 1920, and of bonds and notes thereafter issued under

[20] The distinction between the situation here presented and that in *Morgan* v. *United States*, 113 U. S. 476, is obvious. Congress specifically prescribed many of the terms (including a limitation as to the date of redeemability and the date of final maturity) of the bonds involved in the *Morgan* case, and the discretion of the Secretary of the Treasury was very limited. The power conferred upon the Secretary by the Act pursuant to which the bonds were issued clearly did not include an authorization to call the bonds for redemption prior to maturity (Act of March 3, 1865, 13 Stat. 468), and accordingly a further Act of Congress was necessary for that purpose (Act of July 14, 1870, 16 Stat. 272).

> any of such Acts or under any of such Acts as amended. The sinking fund and all additions thereto are hereby appropriated for the payment of such bonds and notes at maturity, or for the *redemption* or purchase thereof before maturity *by the Secretary of the Treasury* at such prices and upon such terms and conditions as he shall prescribe, and shall be available until all such bonds and notes are retired.

See also: Gold Reserve Act of 1934, c. 6, sec. 14, 48 Stat. 343; Act of February 4, 1935, c. 5, secs. 2, 4, 49 Stat. 20. Compare *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 147.

D. THE ACT OF MARCH 18, 1869, DOES NOT AFFECT THE VALIDITY OF THE CALLS FOR REDEMPTION HEREIN ISSUED

The petitioners in Nos. 42 and 43 urge, finally, that the Act of March 18, 1869, R. S. 3693, 16 Stat. 1, forbade the issuance of the notices of call for redemption here involved (Brief, No. 42, pp. 24–26). That Act in part provided:

> That in order to remove any doubt as to the purpose of the Government to discharge all just obligations to the public creditors and to settle conflicting questions and interpretations of the laws by virtue of which such obligations have been contracted, it is hereby provided and declared that the faith of the United States is solemnly pledged to the payment in coin or its equivalent, of all obligations of the United States not bearing interest, known as United States notes, and of all the interest-bearing obligations of the

> United States except in cases where the law authorizing the issue of any such obligation has expressly provided that the same may be paid in lawful money or other currency than gold and silver. *But none of said interest-bearing obligations not already due shall be redeemed or paid before maturity unless at such time United States notes shall be convertible into coin at the option of the holder, or unless at such time bonds of the United States bearing a lower rate of interest than the bonds to be redeemed can be sold at par in coin* * * *.

1. The petitioners rely upon the second sentence of the Act, which has been italicized. The purpose of that sentence, as its language makes plain, was the protection of holders of United States notes (greenbacks) and not at all of holders of outstanding interest-bearing obligations. The history of the Act shows that the provision became obsolete, its purpose being achieved, when United States notes in 1879 were established on a parity with all other forms of money.

In the first sentence of the Act a pledge had been made for the ultimate payment in coin or its equivalent of (1) United States notes, and (2) Government interest-bearing obligations (except obligations issued under a law expressly providing for payment in some currency other than gold or silver coin). The United States notes were circulating in 1869 at a great discount in comparison with gold and silver coin, which were also in circulation. In addition, during and prior to the Civil

War, the Government had issued bonds which did not expressly state the medium of payment and as to which there was, therefore, doubt. The Act of 1869 sought to alleviate these conditions by a declaration of policy, anticipating the eventual reestablishment of a single standard of value. It sought to do this evenhandedly as between holders of United States notes and Government bonds. In order to protect noteholders, who were not to be paid gold coin or its equivalent immediately, the sentence in question accordingly provided in its first half that until such noteholders were so paid, the payment of bondholders should not be hastened by redemption.

> That is, the bonds of the United States are not to be paid before maturity, while the noteholders are to be kept without their redemption, unless the noteholders are able at the same time to convert their notes into coin. (Congressman Robert C. Schenk, one of the House managers, Congressional Globe, March 3, 1869, p. 1879).

Then, in order not to make that restriction too onerous and to enable the United States to refund its outstanding obligations at a lower rate of interest, should the credit of the Government warrant it, even though there had been no resumption of specie payments on the United States notes, the second half of the second sentence was included.

> * * * It was provided that the Government should not redeem any of its

> obligations in coin before their maturity, * * * until the public credit should have become so good that the Government could sell bonds bearing lower rates of interest at par in coin. (*Information Respecting United States Bonds, Paper Currency and Coin, Production of Precious Metals, etc.*, issued by the Treasury Department, Division of Loans and Currency, July 1, 1915, p. 8).

In view of the purposes, and the circumstances of enactment, of the Act of 1869, it seems apparent (1) that it was intended to apply only to Government bonds then outstanding—or, in the words of the Act, "not already due";—and (2) that the Act became obsolete and ceased to have significance the moment the Government, in 1879, resumed specie payments on its United States notes and maintained all coins and currencies at a parity of value.[21]

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[21] An examination of the Congressional debates and committee reports on this Act and other bills containing comparable provisions confirms these conclusions. Congressional Globe, November 21, 1867, p. 767; December 4, 1867, pp. 24, 25, 26; December 5, 1867, pp. 40–49; December 6, 1867, p. 64; December 16, 1868, pp. 98–99; December 18, 1868, pp. 144–145; January 20, 1869, p. 476; February 22, 1869, pp. 1445–1448; February 23, 1869, pp. 1470, 1471; February 24, 1869, pp. 1534–1539; February 27, 1869, pp. 1658–1661; March 3, 1869, pp. 1829–1834; pp. 1879–1883; March 9, 1869, p. 31; March 11, 1869, pp. 48–56; March 12, 1869, pp. 60–61; March 15, 1869, pp. 64–70; Dewey, *Financial History of the United States* (12th Edition), Sec. 148; Hepburn, *History of Currency in the United States*, pp. 209, 214.

2. These conclusions are further borne out if it be assumed that the Act of March 8, 1869, applied to the redemption of the bonds here involved and an attempt be made to test the validity of the redemption by its terms.

The provision being manifestly for the protection of United States noteholders, a question at once arises whether a bondholder has standing to invoke it. The second sentence, in any event, appears as a qualification of the first; and the question exists whether it has any application where the pledge of the first sentence has already been satisfied. The pledge is for the payment of coin or its equivalent. If United States notes are the equivalent of whatever coin is in circulation, it would appear to be irrelevant to inquire whether their holders can compel them to be converted into coin. The phrase, "unless at such time United States notes shall be convertible into coin at the option of the holder," is a way of saying, "unless United States notes are the equivalent of coin." Under this view, if all coin were withdrawn from circulation the redemption of bonds would not thereby be foreclosed.

In any case the short answer is that both the alternative provisos are satisfied since, when these bonds were called, United States notes were convertible into coin, and United States bonds bearing a lower rate of interest could have been sold for coin. The petitioners' assumption that the word "coin" means "gold coin" is gratuitous. At the

time the Liberty Loan bonds were called for redemption and at the date set for redemption, any holder of a United States note could have presented it to the Treasury of the United States or any fiscal agency thereof and obtained in exchange therefor silver coin. (Compare R. No. 42, 17.) This practice was not only the necessary result of the parity statutes (e. g., Act of March 14, 1900, c. 41, 31 Stat. 45; Act of May 12, 1933, c. 25, sec. 43 (b) (2), 48 Stat. 31, 53), but it was also confirmed in Treasury Department Circular No. 553, dated September 10, 1935.[22]

There is no question but that the Government during the time these bonds were called for redemption could have sold at par in coin bonds bearing a lower rate of interest than the petitioners' bonds. Obligations at such lower rates of interest were in fact issued (see Annual Reports of the Secretary of the Treasury for the fiscal years 1933–1935) at par at a time when all coins and currencies, including silver dollars, were at a parity of value. Accordingly persons would have been just as willing to pay silver coin for such obligations as any other coin or currency. There is no

[22] *Regulations Governing the Exchange of Coins and Currencies of the United States:* "* * * the official agencies of the Treasury Department *will continue* to exchange the coins and currencies of the United States, dollar for dollar, for other coins or currencies which may be lawfully acquired and are legal tender for public and private debts, *to the extent and in the manner in effect immediately prior to the date hereof.*" [Italics supplied.]

basis for contending, as do the petitioners, that the Act of 1869 required that the Government be able to sell its bonds for gold rather than for silver coin; nor that the size of the bond issue is of any consequence since the statute makes no reference to the number of bonds sold, or in fact that there be any actual sale. The fact of the matter is that so long as coins and currencies are maintained at a parity of value, as has been true since 1879, the Government *can* sell bonds at par in silver coin as well as in any other form of coin or currency, and the conditions of the statute, if not obsolete for the reasons previously indicated, have been fully met.

II

Even if Cessation of the Obligation to Pay Interest Were Dependent Upon Fulfillment of the Principal Obligation of the Bonds, That Obligation Has Been Fulfilled

The case for the bondholders rests ultimately upon the contention that the United States is in default upon its contract. Being so in default, it is urged, the United States cannot exercise its option under the contract to terminate the obligation to pay interest. The contention that the United States is in default upon the contract is based upon the decision of this Court in *Perry* v. *United States,* 294 U. S. 330. The decision in that case, far from supporting that view, establishes the precise contrary.

The *Perry* case came before this Court on two questions certified by the Court of Claims under Section 3 of the Act of February 13, 1925. One only of these questions the Court answered,[23] which read as follows:

> 1. Is the claimant, being the holder and owner of a Fourth Liberty Loan 4¼% bond of the United States, of the principal amount of $10,000, issued in 1918, which was *payable on and after* April 15, 1934, and which bond contained a clause that the principal is "payable in United States gold coin of the present standard of value", entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond?

The Court's answer to this question was "no"; and the reason given for the answer, no less than the answer itself, refutes the suggestion that the United States was found to be in any respect in material default upon its contract. It was said (at p. 358):

> * * * in view of the adjustment of the internal economy to the single measure of

[23] The second question, which the Court said "it is not necessary to answer" (294 U. S. at 358), was as follows:

"Is the United States, as obligor in a Fourth Liberty Loan 4¼% gold bond, Series of 1933–1938, as stated in Question One, liable to respond in damages in a suit in the Court of Claims on such bond as an express contract by reason of the change in or impossibility of performance in accordance with the tenor thereof, due to the provisions of Public Resolution No. 10, 73rd Congress, abrogating the gold clause in all obligations?"

> value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements, the *payment to the plaintiff of the amount which he demands would appear to constitute not a recoupment of loss in any proper sense but an unjustified enrichment.* [Italics supplied.]

Accordingly, the Court instructed the court below that the plaintiff was entitled to recover *nothing* in excess of the sum ($10,000 in legal tender currency) which the United States had admittedly tendered him.

The litigation which culminated in the decision in *Perry* v. *United States, supra,* presented to the Court every substantial aspect of the controversy concerning the rights of holders of obligations of the United States containing gold clauses. The inquiry propounded by the Court of Claims opened the way either for an affirmative or negative answer, or for a refusal to answer, as the Court might deem appropriate. The questions at issue—involving public interests of a magnitude seldom, if ever, put to the test of litigation—were elaborately argued. The present claimants offer no adequate reason for the reopening of these questions.

In view of the *Perry* decision, the contention that the United States has committed such a default upon its contract as to disable it from enforcing the redemption provisions must rest either upon complaint at the refusal of the United States

to confer upon the bondholders "an unjustified enrichment," or upon complaint at its refusal to pay them in a coin which had no peculiar value to them. The contention, in either view, deserves short shrift at the hands of this Court.

A. THE UNITED STATES IS NOT IN DEFAULT TO THE BONDHOLDERS FOR FAILURE TO PAY THEM IN GOLD COIN

Throughout these proceedings the bondholders have insisted that, under the decision in *Perry* v. *United States, supra,* they are entitled to be paid in gold dollars, "each containing twenty-five and eight-tenths grains of gold, nine-tenths fine." [24]

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[24] The original dema ds for payment of their bonds by the petitioners in Nos. 42 and 43 were couched in these terms (R. No. 42, 2, 3; R. No. 43, 2, 3). The respondent in No. 198 made no demand whatever. Compare the opinion of Lord Atkin in *R.* v. *International Trustee for the Protection of Bondholders* [1937], 2 All Eng. L. R. 164, 166.

The petitions in the Court of Claims in Nos. 42 and 43 and in the District Court in No. 198 asserted only the right to payment in gold coin and complained only of its refusal (R. No. 42, 3, 4; R. No. 43, 3, 4; R. No. 198, 9, 10).

The assignment of errors filed in the Circuit Court of Appeals in No. 198 insisted exclusively upon the right to payment in gold coin, and apparently in gold coin of the former weight and content (R. No. 198, 32–34).

The failure of the petitioners in both No. 42 and No. 43 to include in the petition for certiorari or supporting brief an assignment or specification of errors [see Rule 28 (2) and Rule 27 (2) (e)] makes it impossible to ascertain the precise ground relied upon for reversal in this Court. But here, as in the Court of Claims, the call for redemption is

The refusal of the United States to tender payment in gold coin, as demanded, they rely upon as sufficient in itself to establish a breach of the obligation of the bond. This refusal, indeed, appears to be the sole ground upon which the allegation of default is rested.[25] The contention that it is a sufficient ground seems to have been accepted by

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attacked generally as void "because it was a call for payment in currency" (Pet. No. 42, 17; Pet. No. 43, 15); and the repeated assertion of a right to payment "in gold" permeates the entire argument. The brief upon the merits filed in No. 42 contains no reference to any other claim than of a right to be paid in gold coin. It is, indeed, asserted that the petitioners could insist upon such a claim, even though the United States offered to pay them "far more than an equivalent" of the gold coin in legal tender (Brief, No. 42, 17).

[25] The brief filed in the Court of Claims in No. 43 referred in a single instance only to a right to payment "in gold or its equivalent" (p. 7). This claim is not repeated here. See note 24, *supra*.

The Court of Claims in No. 42 made the following finding (R. 18, 19), which is not here challenged:

"Had the plaintiff on December 28, 1935, when he presented the bond to the Treasurer of the United States for payment, received ten thousand dollars in gold coin it was his purpose and intention to send the gold coin to the Northern Trust Company as a routine deposit in the plaintiff's dollar account with that bank, for which plaintiff would have received a credit of $10,000 in such account. Had plaintiff accepted the tendered proceeds of the redemption of the bond, he would have purchased therewith some other investment. On December 28, 1935, there was no other investment which plaintiff might have made in the United States with the $10,000 in gold coin that he could not equally as well have made with $10,000 in legal tender currency."

the Circuit Court of Appeals for the Fourth Circuit.[26]

In this conception of the *Perry* case as sanctioning such a claim the bondholders and the Circuit Court of Appeals are doubly in error. The gold clause in the plaintiff's bonds is not a promise for payment solely in gold coin, and no claim of breach of the promise is supportable which does not allege and prove also a failure to pay the equivalent in value of the gold coin. Even if the gold clause could properly be construed, however, as promising payment in gold coin itself, rather than its equivalent, the *Perry* decision does not warrant the bondholders' assumption that the failure to make such payment, under the circumstances there and here presented, would have constituted a breach of obligation.

1. *The gold clause in the claimants' bonds is not a promise for payment solely in gold coin*

None of these bondholders has offered argument, either in this Court or in the courts below, in support of the assertion that the gold clause in United States bonds is a so-called gold-coin contract, promising payment in specie itself, rather than a gold-value contract. The burden rests upon the

[26] The court spoke of "the Government's contract to pay in gold" (87 F. (2d) at 596), and, again, of the necessity of redemption "in accordance with the promise of the bond, i. e., in gold coin based upon a $25\frac{8}{10}$ grain dollar" (p. 598). There was, however, an alternative argument. See pp. 75–77, *infra*.

plaintiffs of establishing this essential element of their demands. That burden cannot be met. Virtually every court of last resort which in recent years has construed such contracts has regarded them as intended to assure payment of the value of gold and not of gold coin itself. *Feist* v. *Société Intercommunale Belge d'Electricité*, L. R. [1934] A. C. 161, 172, 173; *R.* v. *International Trustee for the Protection of Bondholders Akt.*, [1937] 2 All Eng. L. R. 164; *Case of Serbian Loans*, P. C. I. J., series A, Nos. 20–21, pp. 32–41. Compare *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 296, 302; *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324, 336. There is no reason to suppose that *Perry* v. *United States* stands as an exception.

This Court in the *Perry* case, on the contrary, seems to have been unanimously of the opinion that the gold clause in United States bonds was a gold-value contract, so-called, and not a contract prescribing the method of payment.[27] The bond-

[27] Mr. Justice Stone in his concurring opinion stated (294 U. S. at 358):

"I do not doubt that the gold clause in the Government bonds, like that in the private contracts just considered, calls for payment of value *in money, measured by* a stated number of gold dollars defined in the clause." [Italics supplied.]

Speaking in dissent for himself and three other members of the Court, Mr. Justice McReynolds said (p. 362):

"By the so-called gold clause—promise to pay in "United States gold coin of the present standard of value," or "of or

holders rely wholly upon the opinion delivered by the Chief Justice in that case. The following are all the material parts of the section of the Chief Justice's opinion which discussed "the import of the obligation" (pp. 348, 349):

> The terms of the bonds are explicit. They were not only expressed in the bond itself, but they were definitely prescribed by the Congress. * * * The circular of the Treasury Department * * * also provided that the principal and interest "are payable in United States gold coin of the present standard of value."
>
> This obligation must be fairly construed. The "*present* standard of value" stood in contradistinction to a *lower* standard of value. The promise obviously was intended to afford protection against loss. That protection was sought to be secured by setting up a standard or measure of the Government's obligation. We think that the reasonable import of the promise is that it was intended to assure one who lent his money to the Government and took its bond that he would not suffer loss through depreciation in the medium of payment.

This description of the clause as "setting up a standard or measure of the Government's obligation" leaves no substantial room for doubt that it

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equal to the present standard of weight and fineness"—found in very many private and public obligations, the creditor agrees to accept and the debtor undertakes to return the thing loaned *or its equivalent*." [Italics supplied.]

was construed, like the gold clause in the private bond case (*Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 298, 302), as a gold-value contract. An interpretation of the clause as requiring payment in specie—"as fixing the mode and not the measure of payment"—had been suggested to the Court by the Government. Brief for the United States, *Perry* v. *United States*, 15. Had the Chief Justice intended to adopt the specie interpretation, he would scarcely have described "the import of the obligation" in terms of measure rather than mode of payment.

It is a well-understood incident of gold-value contracts that their obligation can be satisfied otherwise than by payment in gold coin. This would presumably be true even if gold coin were freely in circulation. Compare *Gregory* v. *Morris*, 96 U. S. 619, 624, 625. It is certainly so when gold coin no longer circulates. Dealing with a contract in which the alternatives of payment in specie or its equivalent in currency were express, and speaking of the first alternative, this Court said recently (*Holyoke Water Power Co.* v. *American Writing Paper Co.*, *supra*, at 336):

> Here what was intended was to assure the payment of a money debt in dollars of a value as constant as that of gold. *Norman* v. *Baltimore & Ohio R. Co.*, *supra*, p. 302; cf. *Feist* v. *Société Intercommunale Belge d'Electricité*, L. R. [1934] A. C. 161, 172, 173. * * *

In the cited case in the House of Lords, Lord Russell of Killowen, speaking of a gold clause in which the alternatives were not express, said (pp. 171–172):

> * * * neither party can have contemplated payment under the bond being actually made in gold coin. * * * I think that * * * the parties are referring to gold coin * * * not as being the mode in which the Company's indebtedness is to be discharged, but as being the means by which the amount of that indebtedness is to be measured and ascertained.

See also *Case of Serbian Loans, supra; R.* v. *International Trustee for the Protection of Bondholders Akt., supra.* The bonds here in question are similarly contracts for the payment of money. There is no reason to suppose that the bondholders desire to obtain gold coin merely for its intrinsic qualities. None of them is engaged in any business in the operation of which gold is necessary. None of them "can have contemplated payment under the bond being actually made in gold coin", particularly in view of the fact that all of them purchased their bonds when gold coin was no longer in free circulation.

The bonds being gold-value contracts, to allege and prove a failure to pay them in gold coin is wholly insufficient to establish a breach of obligation. It is essential to show also a failure to pay the "equivalent" in value of the gold coin. Such

a showing the bondholders in these proceedings have neither attempted to make nor could make.

The necessity of such a showing—in the view taken by the Chief Justice and the Associate Justices who joined with him—is emphasized by their insistence upon "protection against loss" as an element of the obligation. Manifestly these bondholders have sustained no loss within the meaning of the obligation, as thus interpreted, if they have been tendered the equivalent in value of the gold coin referred to in the bond. The mere fact that actual gold coin has been denied them thus becomes immaterial. The only relevant question is whether they have been caused to "suffer loss through depreciation in the medium of payment," and this question can be answered only by examination of the equivalent which they have been tendered.

2. *The Perry decision does not warrant a conclusion that, under the circumstances presented, the failure of the United States to make payment in gold coin, even if promised, would have constituted a breach of obligation*

The contention of the bondholders, in the aspect now under consideration, amounts at most to a claim of technical breach of contract. Payment of the equivalent of gold coin in legal tender currency would clearly constitute substantial performance even of a contract promising payment in coin itself. This would have been true even before the enactment of the monetary legislation

here involved. It may be assumed, however, that prior to that legislation a refusal to pay in gold coin a bond containing a gold-coin clause would have constituted a technical breach of contract, although such a breach normally would have entitled the bondholder only to nominal damages and, in the case of the United States, would not have been actionable at all. The bondholders insist that a breach of this same character has taken place here.

It is elsewhere pointed out (see pp. 80–87, *infra*) that a merely technical breach of contract would in no event be sufficient to work a forfeiture of the option of redemption. The more fundamental answer, however, is that no such technical breach of obligation here exists.[28] For

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[28] The bondholders attempt to bolster their interpretation of the *Perry* decision as holding the United States to be in at least technical default upon its contract, by reference to the Chief Justice's statement concerning the necessity of proof of actual damages (294 U. S. at 355).

Far from implying that the claimant in that case was entitled to nominal damages, the whole purport of the statement was that the Court of Claims is without jurisdiction to consider such a question. It appears, moreover, from examination of the cases cited by the Court that the real meaning of the rule that the Court of Claims is not constituted to try an action for "nominal damages" is that there is no liability on the part of the Government for action which results in a "taking" of private property unless such "taking" results in pecuniary loss to the owner of the property. *Grant* v. *United States*, 7 Wall. 331, 338; *Marion & Rye Valley Ry.* v. *United States*, 270 U. S. 280, 282; *Nortz* v. *United States*, 294 U. S. 317, 327. The expression "nominal damages," in any event, seems not to have been used in its ordinary sense,

in these cases the reason why the refusal to pay gold coin is not actionable is not merely that the Court of Claims and the district courts are without jurisdiction to award nominal damages against the United States. The further and conclusive reason is that the refusal of the Treasurer to pay gold coin was warranted, and indeed required, by valid legislation enacted by Congress in the exercise of its power to regulate the monetary system. The validity of this legislation was expressly recognized in the prevailing opinions in *Perry* v. *United States, supra.*

Since the claimant himself in the *Perry* case did not question "the right of the Government to discharge its obligation by payment in legal tender currency" (Brief of Claimant, 15, 16), the Court's attention was primarily directed to the question of the amount of such currency to which he was entitled. The opinion delivered by the Chief Justice, in considering that question, however, unmistakably indicated that if the United States had actually committed itself to pay gold coin, valid intervening legislation would have justified the

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i. e., a small sum awarded for the bare infringement of a right unaccompanied by proof of actual loss (1 *Sedgwick on Damages*, 9th ed., secs. 96, 98), for the plaintiff was apparently entitled to judgment in the Court of Claims for $10,000, the face amount of his bond. There was a distinction in this respect between the *Perry* case and the *Nortz* case, *supra.* The plaintiff in the latter case had already been paid the face amount of his certificate in legal tender currency.

refusal of its officers to make such a payment. The opinion stated (pp. 355, 356):

> Before the change in the weight of the gold dollar in 1934, gold coin had been withdrawn from circulation. The Congress had authorized the prohibition of the exportation of gold coin and the placing of restrictions upon transactions in foreign exchange. Acts of March 9, 1933, 48 Stat. 1; January 30, 1934, 48 Stat. 337. Such dealings could be had only for limited purposes and under license. Executive Orders of April 20, 1933, August 28, 1933, and January 15, 1934, Regulations of the Secretary of the Treasury, January 30 and 31, 1934. *That action the Congress was entitled to take by virtue of its authority to deal with gold coin as a medium of exchange.* And the restraint thus imposed upon holders of gold coin was incident to the limitations which inhered in their ownership of that coin and gave them no right of action. *Ling Su Fan* v. *United States,* 218 U. S. 302, 310, 311. [Italics supplied.]

This assertion of the power of the United States to withdraw gold coin from circulation is unequivocal. Such a power necessarily implies the power to refuse to make payment in gold coin, even if promised. The proposition that the United States, although having power to forbid the bondholder to put gold coin to any use save surrender once it has been paid, is without power to refuse to pay it, involves a constitutional absurdity. There is no

justification for an attempt to make the Chief Justice's opinion bear so strained a construction.

The power of the United States "to deal with gold coin as a medium of exchange" would be reduced to a nullity if it did not include the power to refuse to pay such coin, in specie, even where such payment has been promised. The aggregate principal amounts of bonds of the United States containing gold clauses which were outstanding in June 1933 exceeded by a ratio of approximately five to one the aggregate amount of gold in the country.[29] An obligation by the United States to put so much of this gold as it possessed into the hands of its bondholders would have been an obligation to yield over all effective control of the monetary system of the country. Congress has directed that all gold coin of the United States shall be withdrawn from circulation and formed into bars, and has prohibited the future coinage of gold (except coinage for foreign countries) and the payment or delivery of gold coin by the United States. Section 5 of the Gold Reserve Act of 1934, approved January 30, 1934, 48 Stat. 340. In view of the de-

[29] The estimated amount of Federal interest-bearing obligations then outstanding was approximately $21,000,000,000. *Perry* v. *United States*, 294 U. S. at 349. The total gold stocks of the country were reported in Treasury Statement, May 31, 1933, of Money in Circulation as $4,315,380,074, of which $323,881,227 was held outside of the Treasury and the Federal Reserve Banks.

cisions of this Court, an argument that such action by Congress is not a valid exercise of the power to regulate the monetary system (even though it affects the payment of Government gold clause bonds) is frivolous. Compare *Ling Su Fan* v. *United States,* 218 U. S. 302; *Nortz* v. *United States,* 294 U. S. 317; *Holyoke Water Power Co.* v. *American Writing Paper Co., supra,* at 336, 337.

Regarded from the point of view of the power of the United States to borrow money, the hypothesis under consideration is equally baseless. The asserted implication from the power to borrow money—that gold coin, if promised, must be paid—is implied, if implied at all, in order to support the credit of the United States. The credit of the United States would not be supported by the gesture of paying gold coin and then retaking it *instanter.*

"The powers conferred upon the Congress are harmonious," the opinion delivered by the Chief Justice stated (p. 353). The argument now advanced treats them rather as antagonists demanding each other's destruction. Such a construction the Chief Justice's opinion will not bear. Its express recognition of "the authority [of Congress] to deal with gold coin as a medium of exchange" is a recognition also of the authority of Congress to prohibit the payment of gold obligations, public or private, in gold coin. This recognition, indeed, the

opinion did not leave to inference. After stating that "as a remedy for breach, plaintiff can recover no more than the loss he has suffered," it added, *"and of which he may rightfully complain"* (p. 354). The loss of which the plaintiff *could not* rightfully complain the opinion proceeded to state explicitly (p. 357):

> In considering what damages, if any, the plaintiff has sustained by the alleged breach of his bond, it is hence inadmissible to assume that he was entitled to *obtain* gold coin for recourse to foreign markets, or for dealings in foreign exchange, or for other purposes contrary to the control over gold coin which Congress had the power to exert, and had exerted, in its monetary regulation.[80]

The argument for these bondholders and the decision of the Circuit Court of Appeals proceed in direct disregard of this unmistakable declaration.

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[80] The only question here important is the power of Congress to prohibit payment of gold coin in specie where the use of gold coin, once paid, is prohibited. The opinion did not consider whether the existence of the power depends on that condition, or what would be the consequence if gold coin of the present standard of weight and fineness were put into circulation. Presumably the bondholder, if entitled to be paid in gold coin at all, would not be entitled to payment based upon the former standard of weight and fineness, for the enrichment which would accrue from such payment would not differ in kind from the enrichment sought by the claimant in the *Perry* case, and denied.

B. THE UNITED STATES IS NOT IN DEFAULT TO THE BONDHOLDERS FOR FAILURE TO PAY THEM A NUMBER OF DOLLARS IN LEGAL TENDER CURRENCY IN EXCESS OF THE FACE AMOUNT OF THE BONDS

The determination in the *Perry* case that Congress has power to protect the nation's physical reserves of gold bullion and gold coin, and to regulate or prohibit dealings therein, was ancillary to the issue there presented—namely, what constituted the equivalent of the gold coin stated in the bond. As before stated (p. 62, *supra*), no corresponding issue appears to be presented in these cases. In confining their claim of default to complaint at the failure of the United States to tender payment in specie, these bondholders thus impliedly recognize, as they must, that the *Perry* decision—at least as to claimants in their position—is conclusive as to what constitutes the equivalent of payment in specie. Because of the gravity of the question, however, and because of certain statements in the opinion of the Circuit Court of Appeals in No. 198, it is important that this second aspect of possible controversy should be discussed.

While insisting upon the obligation of the Government to pay "in gold", the Circuit Court of Appeals stated that "substantial compliance" with that obligation in legal tender currency could only be made by payment of 1.69 dollars for each gold dollar expressed in the bond.

The court declared (R. 28):

> The notice of redemption calling the bond in question for payment was equivalent, therefore, to a notice that the United States elected to redeem the bond in paper currency based on a 15 5/21 grain dollar, notwithstanding that it was payable in gold coin based on a 25 8/10 grain dollar and might be redeemed only at its face value.

Again, it said (R. 32):

> [The Government] is proposing to redeem them [the bonds], not by paying them at that face value, but in paper money *worth only about .59 per cent. thereof.* [Italics supplied.]

These statements are consistent with the views expressed by the dissenting Justices in the *Perry* case but not with the prevailing opinions. The plaintiff in the *Perry* case demanded as "the 'equivalent' in currency of the gold coin promised" (p. 357) precisely the amount which the Circuit Court of Appeals now holds the gold coin to be "worth." This Court, however, held that under the circumstances there presented (which are identical with the circumstances in these cases) such a payment would constitute "not a recoupment of loss in any proper sense but an unjustified enrichment" (p. 358). Obviously this would not have been so if the equivalent to which the bondholder was entitled had been an amount of legal tender currency computed mathematically in accordance with the ratios of the statutory gold content of the

past and present dollars. The *Perry* decision is a flat rejection of such a method of computing equivalence or worth, without regard to actual loss. The opinion delivered by the Chief Justice said (p. 358):

> Plaintiff seeks to make his case solely upon the theory that by reason of the change in the weight of the dollar *he is entitled* to one dollar and sixty-nine cents in the present currency for every dollar promised by the bond, regardless of any actual loss he has suffered with respect to any transaction in which his dollars may be used. We think that position is untenable.

So also is the position of the Circuit Court of Appeals untenable.

The factor which was decisive in shaping the Court's conclusion in the *Perry* case, as disclosed in the Chief Justice's opinion, was the maintenance of all forms of money at a parity in the economy of the country, pursuant to the legislation of Congress. After reviewing the Acts of Congress placing restrictions upon transactions in gold coin, and upholding their constitutionality (pp. 355, 356), the opinion said (p. 357):

> In considering what damages, *if any,* the plaintiff has sustained by *the alleged breach* of his bond, it is hence inadmissible to assume that he was entitled to obtain gold coin for recourse to foreign markets, or for dealings in foreign exchange, or for other purposes contrary to the control over gold coin

> which the Congress had the power to exert, and had exerted, in its monetary regulation. * * *.

The opinion was here referring to one phase of the legislation maintaining all forms of money at a parity—the circulation of gold coin, or any other currency, at a premium in foreign or other transactions being, of course, inconsistent with any such legislation. The opinion continued:

> Plaintiff's damages could not be assessed without regard to the internal economy of the country at the time *the alleged breach* occurred. The discontinuance of gold payments and the establishment of legal tender currency on a standard unit of value with which "all forms of money" of the United States were to be "maintained at a parity" *had a controlling influence upon the domestic economy.* * * * In the domestic transactions to which the plaintiff was limited, in the absence of special license, determination of the value of the gold coin would necessarily have regard to its use as legal tender and as a medium of exchange under a single monetary system with an established parity of all currency and coins. And in view of the control of export and foreign exchange, and the restricted domestic use, the question of value, in relation to transactions legally available to the plaintiff, would require a consideration of the purchasing power of the dollars which the plaintiff could have received. Plaintiff has not shown, or attempted to show, that in

> relation to buying power he has sustained any loss whatever. On the contrary, *in view of the adjustment of the internal economy to the single measure of value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements,* the payment to the plaintiff of the amount which he demands would appear to constitute not a recoupment of loss in any proper sense but an unjustified enrichment. [Italics supplied.]

The terms of the contracts involved in these cases are identical with those construed by this Court in the *Perry* case. The same monetary restrictions are involved. All forms of money are still maintained at a parity in the economy of the country; and the gold dollars expressed in the bonds could still be used for no purpose for which the dollars tendered to the bondholders are not available. None of the bondholders is engaged, or licensed to engage, in a business in which gold is necessary. These bondholders likewise have not shown or attempted to show that they would have suffered any pecuniary loss as a result of the redemption of their bonds by payment dollar for dollar in legal tender currency. Payment of a greater amount would as surely have resulted in an unjustified enrichment of the bondholders. Here, as in the *Perry* case, therefore, the payment tendered was the precise equivalent of the gold dol-

lars stated in the bonds. If, as clearly appears, the gold clause is a measure-of-value clause, the tender of this equivalent was an exact performance of the obligation of the bonds.[31]

III

A Merely Technical or Prospective Default on the Part of the United States in no Event Would Warrant a Present Forfeiture of the Option of Redemption

The suggestion that the United States, under the prevailing opinions in *Perry* v. *United States,* is in even technical default upon its contract is untenable. Insistence upon this position, however, in no sense implies that establishment of a merely technical breach would suffice to support the bondholders' ultimate contention. Nothing short of a position of material default on the part of the United States would in any event warrant the effort here made to work a forfeiture of the option of redemption.

It has already been shown (pp. 33–36, *supra*) that the contract stated only one express condition upon the occurrence of which interest was to cease. That express condition was the issuance of a notice of call designating a date for redemption, and the

[31] Even if the clause had been construed as a mode-of-payment clause, such a tender would have been at least a substantial performance before the enactment of legislation forbidding payment of gold coin, and after the enactment of such legislation would have been an exact performance. See pp. 68–74, *supra.*

passage of time to that date. If a call for redemption may ever be questioned on the ground of extrinsic circumstances assertedly showing that the obligor does not contemplate a proper performance, assuredly it is so only when the performance contemplated is in a real, as opposed to a technical, sense defective. Any implied condition which might conceivably be read into the contract, supplementing the condition stated by the parties, would similarly be no more than a condition that performance be tendered in substantial compliance with the contract. Compare *Main* v. *Oien*, 47 Minn. 89. For, in either case, the only possible reason for going behind the letter of the call or the contract would be to do justice and avoid hardship.[82]

Not in any view do the prevailing opinions in *Perry* v. *United States* support a contention that the United States is materially in default on its contract. On the contrary, they establish conclusively that the bondholders have been tendered at least the substantial equivalent of the performance due. To sustain the contention now advanced

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[82] Concerning conditions implied in law, Professor Williston comments as follows (3 Williston on Contracts, rev. ed., Section 669):

"Where, however, the law itself has imposed the condition, in absence of or irrespective of the manifested intention of the parties, it can deal with its creation as it pleases, shaping the boundaries of the constructive condition in such a way as to do justice and avoid hardship."

would accordingly avoid no hardship, and, far from doing justice, would confer upon the bondholders—at the cost of grave embarrassment to the management of the public debt—an unmerited premium. (See pp. 83–84, *infra*.)

Taken at its strongest, the case for the bondholders under the opinions in *Perry* v. *United States* comes at most to this: The United States has taken the position that holders of its gold clause bonds are entitled to be paid no more than the face amount of their bonds in legal tender currency. That position under the circumstances now existing has been judicially determined to be correct. Under circumstances undefined, which might arise in the future, it has been intimated that it might be incorrect. 294 U. S. at 350–354. See *ibid*, pp. 359, 360. Compare pp. 87–102, *infra*. The possibility of future invocation of the gold clause by these or other bondholders as a protection against conditions not now existing affords no justification for a present forfeiture of the obligor's option of redemption at the instance of these bondholders, whose demands are clearly for an unjust enrichment.

Provisions for redemption contemplate that the obligor may wish to refund his obligations upon different and, to him, more favorable terms. After the date upon which the bonds became callable, they confer upon him in ordinary course an absolute right to do so. The bondholder, so long

as he is tendered everything to which he is presently entitled, has no greater standing to complain because he is losing a possible future claim under the bonds than because he is losing a return higher than any which upon reinvestment he will be able to obtain. The *Perry* decision conclusively establishes that these bondholders have been tendered everything to which they are presently entitled by virtue of the gold clause.

In effect, indeed, these bondholders are here seeking precisely the premium which they would receive if the United States were permitted to redeem its bonds only upon compensating the holders for the loss of their investment during the balance of the term. By the express terms of the bonds and of Treasury Department Circulars Nos. 78 and 121, pursuant to which the bonds were issued, they were to be paid on redemption before maturity at par and accrued interest—not at the price which the bonds would have been worth if they had not been redeemable. The approximate prices at which the bonds were purchased were 103 (Nos. 42 and 43) and 101 (No. 198).[33] In one case (No. 43), in order (it may be inferred) to obtain a bond upon which suit could be brought without delay, the price paid was in excess of the price (100) at

[33] Payment for such bonds was effected by a New York draft payable in dollars (*Dixie Terminal*), by entering a debit against the bondholders' bank account in a dollar amount equal to the purchase price of the bonds (*Smyth*), and by a check payable in dollars (*Machen*).

which bonds of that series were selling when available in the open market (R. 11). According to the finding in No. 42, if the bond in that case were a valid outstanding interest-bearing obligation of the United States, it would now be worth approximately 110 (R. 19). The bondholders are asking this Court to declare that the bonds are outstanding and drawing interest. It is apparent, therefore, that the bondholders, far from claiming that they would have suffered any loss as a result of the redemption of their bonds dollar for dollar in legal tender currency, are, in effect, demanding an uncontemplated premium.

The suggestion is made on behalf of the bondholders that the only reason why these bonds have been called in advance of maturity is to take advantage of the present inability of the holders to prove that they are entitled to payment otherwise than in the face amount of legal tender dollars (Brief, No. 42, p. 12). As already indicated, if this were the sole motive of the United States in exercising its option to redeem, it would not be an unworthy one. But the suggestion is wholly without foundation, actual or proffered. Since these bonds were issued the conditions of the money market have drastically altered and have altered independently of the monetary legislation of which the bondholders complain. Long-term interest rates are materially lower. The redemption of each of the bonds here involved was part of a refunding

operation designed primarily to take advantage of these conditions. The same thing is true, with a single exception, of every call for redemption of "gold clause" obligations of the United States which has been issued since 1933.[34] Had the Secretary of the Treasury failed to secure for the United States the huge savings in interest thus effected he would have been remiss in the performance of official duty. Manifestly, these savings in interest were the prime motive of the United States in calling these bonds for redemption, and not the

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[34] The exception was the redemption in 1935 of the two per cent Consols and two per cent Panamas. The Treasury Department press release, dated March 9, 1935, for release on March 11, 1935, announcing the contemplated call for redemption of the Consols and Panamas explains the basis for retiring these bonds. They bore the circulation privilege and therefore could be used as security for the issuance of national bank or circulating notes. The press release stated in part:

"The retirement of the two per cent Consols and the two per cent Panama Canal bonds, and the expiration of the temporary authorization for issuance of national bank notes against other bonds will accomplish a simplification of the currency system through the elimination of national bank notes, an action contemplated at the time of the passage of the Federal Reserve Act. More than $500,000,000 of the bonds being called are now on deposit with the Treasurer as security for this type of currency.

"The Federal Reserve Bank notes authorized as emergency currency in the Emergency Banking Act of 1933 are now in process of retirement. National bank notes will be retired as rapidly as they are presented to the Treasury. It is expected that the great majority will be cancelled within a year."

situation created by the decision in *Perry* v. *United States*.[85]

The savings in interest effected by refunding operations in recent years are primarily significant as emphasizing the gravity of the interference with the exercise by the Government of the power to manage the public debt which acceptance of these bondholders' contentions would entail. Enough has already been said concerning the critical importance of the function of callable bonds in public finance (see pp. 21–33, *supra*). The ultimate constitutional reliance of the bondholders is the necessity of maintaining unimpaired the borrowing power of the United States. That power would not be strengthened by the acceptance of the contention of these plaintiffs. On the contrary, to the extent that such a decision would interfere with the sound administration of the public debt, it

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[85] The observation of the petitioners in Nos. 42 and 43 (Pet., No. 42, p. 16; Brief, No. 42, p. 12; Pet., No. 43, pp. 14–15) that "if the Government had to pay the bond in gold, it would never have called the bond" is frivolous. The Government, as the *Perry* case establishes, was not under a duty to pay "in gold." See pp. 61–74, *supra*. What the consequences would have been, had the *Perry* case determined that it was under such a duty, is wholly speculative. The United States might have been compelled to reestablish the former content of the gold dollar. Such action would no doubt have had far-reaching effects upon the economic system of the nation. It would not, however, have spared these bondholders any loss they have actually sustained, for they have not proved that they have sustained any loss. Nor would it have conferred upon them the enrichment they are now seeking.

would tend to restrict the very power which—in the opinion in the *Perry* case upon which the bondholders rely—it was deemed necessary to protect.

IV

The Bondholders Misinterpret the Statements in the Opinion Delivered by the Chief Justice in the Perry Case Reflecting Upon the Constitutionality of the Joint Resolution of June 5, 1933

The contention of the bondholders ignores not only the holding in the *Perry* case, as embodied in the Court's answer to the Court of Claims, but the greater part of the opinion delivered by the Chief Justice in explanation of that holding. Attention is sought to be fixed upon certain statements in the second section of that opinion (pp. 349–354) leading up to the stated conclusion (p. 354) that:

> * * * the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power.

The Government believes that this statement and the discussion which precedes it are in no event material to the determination of the cases now before the Court. Accordingly, we do not here enter into the extended consideration of the questions involved which their importance would otherwise require. It is appropriate, however, that the Government's position should be stated at least in summary form. We believe that the present plaintiffs

are seriously in error in interpreting the statements in question as a conclusion that subsequent legislation affecting bond contracts must necessarily be unconstitutional. If, however, the bondholders' interpretation be correct, and if the statements as so interpreted have application to the cases at bar, then with deference we submit that the conclusions announced require further consideration here.

The passages in the opinion in question stated the views of only four members of the Court. Mr. Justice Stone, whose concurrence was necessary to make the answer of the Chief Justice and the three Associate Justices the answer of the Court, expressly refrained (pp. 358–361) from intimating an opinion upon any constitutional or other legal question not required by that answer. By the settled doctrine of this Court the statements under consideration do not, therefore, have the force of precedent. *Alaska* v. *Troy*, 258 U. S. 101, 111. Compare *City of New York* v. *Miln*, 8 Pet. 120, *United States* v. *Celeste Macarty et al.*, Archives, December Term, 1851, p. 199. The statements, moreover, were not necessary to the conclusion—as embodied in the answer actually given to the Court of Claims—reached by the Justices who made them. By the settled doctrine of the Court, the statements for this further reason are not of the authority of precedents. *Myers* v. *United States*, 272 U. S. 52, 142; *Liverpool, N. Y. & P. S. S. Co.* v. *Commis-*

sioners of Emigration, 113 U. S. 33, 39. Compare *United States* v. *Hastings,* 296 U. S. 188, 192, 193.

It may be questioned whether the reflections cast upon the constitutionality of the Joint Resolution of June 5, 1933, do not for still a third reason fail to establish any constitutional principle. As before stated (pp. 63–68, *supra*), the opinion delivered by the Chief Justice appears to have construed the bond as a gold value contract "intended to afford protection against loss",[36] and not, as these bondholders assume, as a flat promise to pay in specie gold dollars, "each containing twenty-five and eight-tenths grains of gold, nine-tenths fine." Accordingly, the finding ultimately made that the plaintiff had sustained no loss—in the sense in which that term was used throughout the opinion—would appear to be a finding that there had been no infringement of the obligation as originally contracted. In this view, the bond in suit at no time gave rise to any other obligation than to pay the equivalent in money, prevailing in the internal economy in view of ~~as established from time to time by~~ the legislation of Congress, of the gold dollars expressed in the bond. If this be so, the subsequent monetary legislation of the Congress was within the contemplation of the contract. The validity of that legislation apart from its effect

[36] "We think that the reasonable import of the promise is that it was intended to assure one who lent his money to the Government and took its bond that he would not suffer loss through depreciation in the medium of payment" (294 U. S. at 348, 349).

upon Government contracts having been settled in *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, and *Nortz* v. *United States*, 294 U. S. 317, no further constitutional question remained to be decided in the *Perry* case. Compare *Cohens* v. *Virginia*, 6 Wheat. 264, 399; *O'Donoghue* v. *United States*, 289 U. S. 516, 550; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 627.

The present bondholders, we believe, have gravely misconceived the purport of the second section of the opinion delivered by the Chief Justice. The members of the Court who joined in that opinion understood the Government to contend "that when, with adequate authority, the Government borrows money and pledges the credit of the United States, it is free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient" (p. 350). Elaborating the position thus attributed to the Government, the opinion proceeded (*ibid.*):

> The Government's contention thus raises a question of far greater importance than the particular claim of the plaintiff. On that reasoning, if the terms of the Government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to amount to be paid may also be repudiated. The contention necessarily imports that the Congress can disregard the obligations of the Government at its discretion and that, when the Government borrows

money, the credit of the United States is an illusory pledge.

We do not so read the Constitution. * * *

The entire discussion upon which the bondholders now rely, which follows immediately after this statement of the Government's position, appears to constitute exclusively a refutation of it. The discussion was expressly stated to concern "a question of far greater importance than the particular claim of the plaintiff", and seems, therefore, to have only limited application to that claim. The import of the discussion was that the United States is subject to the obligation of its contracts, whatever that obligation may be; that it is not free to repudiate them, any more than a private individual is free to repudiate his contracts. It follows from this that legislation declaring contracts into which the United States has entered to be "against public policy" and void affords in itself no sufficient defense to a suit upon the contract. If this be the meaning of what was said, the concluding statement concerning the constitutionality of the Joint Resolution signifies only that the short answer of that Resolution to the bondholder's claim was inadmissible, that the United States may not arbitrarily deny the binding quality of its own contracts.[87]

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[87] An argument that the Joint Resolution of June 5, 1933, was a constitutional exercise of the monetary power would plainly go too far to the extent that it implied that the

The Government does not contend "that the Congress can disregard the obligations of the Government at its discretion." It did not wish to be understood as so contending in *Perry* v. *United States*. The Government sought there to defend the applicable legislation of Congress only as a regulation of the currency valid under the circumstances which had been before the Congress and were then before the Court. Its utmost position may be summed up in the language of the opinion under consideration (p. 352):

> When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to

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power to regulate the currency gave the United States the power to disregard its obligations at its discretion. It may be, however, that the Joint Resolution was regarded as invalid, not as an exercise of the monetary power transcending the limits of that power, but as an attempt to deal directly with the obligation of Government contracts presupposing a power over those contracts as such which did not exist. Compare *Lynch* v. *United States*, 292 U. S. 571. In this view a distinction existed between the Joint Resolution and other legislation of the Congress which was valid as an exercise of the monetary power, although it affected indirectly the obligation of Government contracts. Compare the distinction found by this Court to exist between the legislation invalidated in *Coppage* v. *Kansas*, 236 U. S. 1, and *Adair* v. *United States*, 208 U. S. 161, and that sustained in *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 571; and the distinction between the statute found to be invalid in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, and that upheld in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. (preliminary print) 1, 40, 41, 45.

> those of individuals who are parties to such instruments. There is no difference * * *, except that the United States cannot be sued without its consent.

In this view of the meaning of the second section of the opinion delivered by the Chief Justice in the *Perry* case, its correctness as substantive constitutional doctrine, constituting the background of the particular issues there presented, is not questioned. A question does arise only if that section is to be understood as declaring that the United States when it enters into a borrowing contract is in a wholly *different* position from that of an individual; that the obligation of its contracts may not in any fashion be affected by a subsequent exercise of the Federal monetary power.

Such a conclusion may be thought to be suggested in the statement (294 U. S. at 353) that "the right to make binding obligations is a competence attaching to sovereignty." In the sense already discussed (pp. 91–92, *supra*), that contracts of the United States bind the United States as do contracts of individuals, this proposition is undoubted. We do not take it as deciding, however, that a bond of the public debt is executed by the United States in its sovereign capacity. Such a meaning would be at variance with statements of this Court uniformly indicating that governmental promises to pay money are executed by a government in its corporate and proprietary character

and not as sovereign. See *Murray* v. *Charleston*, 96 U. S. 432, 445; *United States* v. *State Bank*, 96 U. S. 30, 36; *United States* v. *Bank of the Metropolis*, 15 Pet. 377, 391, 392. Compare *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, 350. Were a Government bond an act of the sovereign, such as a treaty,[38] then by the same token the Court of Claims and this Court would have been without jurisdiction of a suit on the bond, for the United States has never consented to be sued on any matter touching its sovereignty.[39] Compare *Muskrat* v. *United States*, 219 U. S. 346, 361; *United States* v. *State Bank*, 96 U. S. 30, 36; *Tillou's Case*, 1 C. Cls. 220, 221, 222.

The doctrine that the United States as a contractor is entitled to defenses available to private contractors has been unquestioned since the very establishment of the Court of Claims. *Deming's Case*, 1 C. Cls. 190; *Jones' and Brown's Case*, 1 C. Cls. 383, 385; *Wilson's Case*, 11 C. Cls. 513; *Harmon* v. *United States*, 23 C. Cls. 132, 141. Compare *United States* v. *Warren Transp. Co.*, 7 F. (2d) 161, 163 (Mass.). It was approved after full consideration by this Court in *Horowitz* v. *United States*,

[38] Compare Oppenheim, *International Law*, 4th ed., Vol. I, Secs. 493, 494; Hall, *International Law*, 8th ed., Sec. 107; Hyde, *International Law*, Vol. 2, Sec. 489.

[39] Compare Hyde, *International Law*, Vol. I, p. 561; Borchard, *Diplomatic Protection of Citizens Abroad*, Sec. 48; Manton, *Governmental Defaults in Obligations*, 68 U. S. Law Rev. 131, 137.

267 U. S. 458 (1925). More recently this Court in *Lynch* v. *United States,* 292 U. S. 571, 579, expressly recognized that while the due process clause forbids Congress to single out war risk insurance contracts and annul them, a different question would be presented with respect to "action taken * * * within the federal police power or some other paramount power." See also *North American Commercial Co.* v. *United States,* 171 U. S. 110, 137. The principle that governmental action taken in pursuance of sovereign governmental powers for the general good may affect rights arising out of transactions entered into between the Government and private individuals may justly be considered a postulate of American public law. Contracts by the States which, in express terms, bargain away essential governmental powers have long been regarded by this Court as inconsistent with the requirement of constitutional government that powers conferred for the benefit of the whole people should at all times be available to be exercised for the benefit of the whole people. *West Bridge Bridge Co.* v. *Dix,* 6 How. 507, 531; *Butler* v. *Pennsylvania,* 10 How. 402, 416; *Beer Co.* v. *Massachusetts,* 97 U. S. 25, 33; *Newton* v. *Commissioners,* 100 U. S. 548; *Stone* v. *Mississippi,* 101 U. S. 814, 818; *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746, 750–753; *Illinois Cent. R. R.* v. *Illinois,* 146 U. S. 387, 454–456; *Chicago & Alton R. Co.* v. *Tranburger,* 238 U. S. 67, 76–77. But

compare *The Delaware R. R. Tax,* 18 Wall. 206, 226; *Railroad Comm.* v. *Los Angeles Ry. Corp.,* 280 U. S. 145, 152.

This requirement is in no way peculiar to State governments, for it rests not on any supposed inferiority of those governments but on the supremacy of the public interest. It applies with special force to the power conferred upon the Federal Government to provide a sound and uniform currency for the whole nation. The principle in question, far from opening the door to special repudiation by the Government of its own obligations, comes into operation by hypothesis only when Governmental powers are exerted, and validly exerted, by an act of general legislation. Its application in connection with the monetary power is thus attended by a special safeguard because of the necessary generality of an exertion of that power. The principle assumes that the Government's position as a debtor is on a parity, at least, with that of other debtors. In no degree, therefore, is it opposed to the desideratum of constitutional government that governmental action be taken and tested in accordance with law. Rather is it in aid of that desideratum for the enforcement of special contractual limitations—implied or express—upon the exercise of general governmental powers can only tend, in time of stress, to the withdrawal of sovereign consent to suit upon the contracts. Compare 294 U. S. at 360. The assertion of the peti-

tioner in No. 42 (Brief, 15) that the principle exemplified in *Horowitz* v. *United States, supra,* "in the matter of Government bonds was destroyed once and for all in the *Perry* case" would, if correct, be cause for grave concern.

The Government does not believe that the opinion delivered by the Chief Justice in the *Perry* case announces the doctrine that borrowing contracts of the United States may not in any fashion be affected by a subsequent exercise by Congress of the power to regulate the currency. The opinion, on the contrary, expressly stated (p. 353) that "the powers conferred upon the Congress are harmonious." This would not be true if every exercise of the borrowing power nullified, by so much, the monetary power. Whether borrowing contracts of the United States may be affected in every respect identically with private borrowing contracts by subsequent monetary legislation is unnecessary here to consider, as it was unnecessary in the *Perry* case. The doctrine exemplified by *Horowitz* v. *United States, supra,* expresses a general principle of law: that there is a significant distinction between governmental action exerted by way of general legislation, which is of the essence of that for which a government is constituted, and governmental action exerted by way of contract with a private individual. The correctness of the principle need only be submitted to the test of the appropriateness of its application to the particu-

lar case at hand. Every valid contract of the United States is made in pursuance of some power vested in the Federal Government. In such a test, therefore, the relevant inquiry must always be whether the power in aid of which the contract was made will be impaired by recognition that the contract may be affected by a later act of general legislation pursuant to some other power. The opinion of the Chief Justice is concerned with such an inquiry. The effect of that opinion is that, in every respect material in any view to the controversy before the Court, the carrying out of the contract in suit was subjected to the monetary legislation of the Congress.

United States bondholders, the opinion states (p. 357), are not "entitled to obtain gold coin for * * * purposes contrary to the control over gold coin which the Congress had the power to exert, and had exerted, in its monetary regulation." This would be so, the opinion makes plain (see pp. 68–74, *supra*), even though such payment had been promised them. Such a case is an indubitably proper one for application of the principle that contracts between the Government and private individuals may be affected by a subsequent exertion of general and paramount governmental power. For a different conclusion would render nugatory "the authority to deal with gold coin as a medium of exchange" (p. 356). And so long as

the bondholder be tendered the equivalent of the promised coin no question exists of impairment of the borrowing power and of the credit of the United States.

The opinion delivered by the Chief Justice clearly indicates, furthermore, that in determining the value in legal tender currency of a stated amount of gold coin account must be taken of the monetary legislation enacted by Congress after the contract was made. This is manifest in the ruling of the opinion that the value of the coin which was determinative was its value in the internal economy of the country, as established by the legislation of Congress. The reasoning upon which this conclusion rests need not turn upon the view that the plaintiff had agreed, as by a term implied in fact in the original contract, to such a valuation. The term, if term it was, must also have been implied in law. For a contract without such a term would amount to a contract granting an exemption from the operation of general monetary legislation. Such an exemption would gravely hamper the exercise of the monetary power outside the purview of the contract. And its allowance would be unnecessary to the support of the borrowing power. Granting that the maintenance of the credit of the United States requires, as, of course, it does, that the borrowing contracts of the Government be fulfilled according to law, it does not require, as an in-

ducement to lending, that particular lenders be exempted from the operation of law, with consequent paralysis of governmental power intended to be exercised for the benefit of all persons. Sovereign powers of government were not conferred upon the Congress for the purpose of being thus bargained away, by contract with private persons, in supposed aid of other governmental powers.

Whether such an exemption would be defensible if it enabled the bondholder to do no more than escape the adverse effects, if any, of general monetary legislation is open to the most serious question. The conclusive reason, however, why such an exemption ought not to be upheld is that it would be impossible thus to confine its effect. So to confine its effect would require means which do not exist, for measuring the purchasing power—in terms of commodities—of the dollars paid the bondholder in comparison with that of the dollars which would have been paid him had no subsequent monetary legislation whatever been enacted. Short of such means, the bondholder would be enabled to claim by the terms of the contract a patently unjustifiable enrichment. This would be true, in all but exceptional circumstances, if the bondholder were permitted to receive an amount in legal tender currency representing the value of the gold coin in markets not legally available to him. It would most clearly and certainly be true, as made plain in the opinion delivered by the Chief Justice, if the gold clause were regarded as a gold value contract providing within itself a measure

of "value" depending arbitrarily upon the ratio between the statutory gold content of the dollar at different times.

Such a contract would enable the bondholder affirmatively to profit by an increase in the "value" of gold coin which, so far as it could be said to exist at all, was the result solely of the exercise by Congress of its monetary powers. The "value" of the gold coin indeed would have no other basis than the mere declaration of Congress with respect to the statutory gold content of the dollar. In the internal economy of the country the gold coin stated in the bonds increased in "value" in terms of legal tender currency, merely because of the reduced statutory content of the dollar, in none but a hypothetical and factitious sense. Had that coin been and remained freely exchangeable for legal tender currency, it would have brought in exchange a greater number of dollars in legal tender currency after devaluation than before. But gold coin in fact was not so exchangeable. There is small ground for supposing that, had it been, the dollar could or would have been devalued. To have regarded the gold coin as having increased in value merely because of the congressional legislation, therefore, would have been to disregard not only the terms of the legislation but the actualities which lay behind its enactment. It would have been to disregard also the actualities which succeeded its enactment. In the markets of the country a dollar in legal tender currency continued to be worth as much to the

bondholder as a dollar in gold coin, whatever its gold content, would have been.

The Government does not believe that the opinion of the Chief Justice in the *Perry* case announces the doctrine that a contract providing for an enrichment of this character must be enforced. The reasons why such an enrichment would be unjustifiable, on the contrary, are set forth in the opinion and form the basis of the decision. Implicit in the decision of the Court in the *Perry* case, under this view of the gold clause, as Mr. Justice Stone pointed out (294 U. S. at 360, 361), is the holding that "the prohibition [of such payment], at least in the present situation, is itself a constitutional exercise of the power to regulate the value of money." To have upheld a claim based upon such a contract would have been incompatible with the constitutional principle, recognized in the opinion delivered by the Chief Justice, which requires that the powers of Congress be so construed as to permit each power to be exercised to the fullest extent consistent with a similar exercise of other powers. It would be doubly incompatible in the cases at bar where the claimed limitation upon the monetary power, if given the effect here sought, would seriously restrict the borrowing power itself in an essential aspect—the power to manage the public debt.

CONCLUSION

It is respectfully submitted that the judgments of the Court of Claims in No. 42 and No. 43 should be affirmed and that the judgment of the Circuit Court of Appeals for the Fourth Circuit in No. 198 should be reversed.

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NOVEMBER 1937.

APPENDIX A

Government stocks and bonds containing redemption provisions

Loan	Date of Maturity	Date of Redeemability
Holland Loan of 1784	January 31, 1801–7 (Annual installments).	January 31, 1801.
Holland Loan of March 1791.	March 1, 1802–6 (Equal annual installments).	Right to redeem the whole at an earlier period.
Holland Loan of September 1791.	1802–6 (Equal annual installments).	Right to redeem the whole at an earlier period.
Antwerp Loan of 1791	1802–6 (Equal annual installments).	Right to redeem the whole or part sooner—no date.
6% Stock of 1790		Yearly payments—not exceeding 8%, on account both of principal and interest.
Deferred 6% Stock of 1790		Yearly payments—not exceeding 8%, on account both of principal and interest.
3% Stock of 1790		Whenever provision should be made therefor by law.
Subscription Loan of 1791	1792–1801 (Equal annual installments).	Sooner or in greater proportions at the option of the Government.
Temporary Loan of 1792		At the pleasure of the United States.
Temporary Loan of 1793		At the pleasure of the United States.
Temporary Loan of March 1794.		At the pleasure of the United States.
Temporary Loan of June 1794.	July 1, 1795	At the pleasure of the United States.
Temporary Loan of March 1795 (A).	January 1, 1797	At the pleasure of the United States after one month's notice.
Temporary Loan of March 1795 (B).		On or before December 31, 1797.
5½% Stock of 1795		At the pleasure of the United States
4½% Stock of 1795		At the pleasure of the United States
Temporary Loan of 1798	January 1, 1803	At the pleasure of the United States after one month's notice.
6% Stock of 1796		At the pleasure of the United States after December 31, 1819.
Navy 6% Stock		At the will of Congress.
8% Loan of 1798		At the pleasure of the United States after 14 years.
8% Loan of 1800		At the pleasure of the United States after 15 years.
Exchanged 6% Stock of 1807.		At the pleasure of the United States after 6 months' notice.
Converted 6% Stock of 1807.		At the pleasure of the United States after 6 months' notice, but not without the assent of the holder until after all the 8%, 4½%, and Exchanged 6% stocks had been redeemed.

Government stocks and bonds containing redemption provisions—Con.

Loan	Date of Maturity	Date of Redeemability
Loan of 1810		On or before December 31, 1811.
6% Loan of 1812		At the pleasure of the United States after December 31, 1824.
Temporary Loan of 1812		Various dates according to contract.
Exchanged 6% Stock of 1812.		At the pleasure of the United States after December 31, 1824.
$16,000,000 Loan of 1813		At the pleasure of the United States after December 31, 1825.
$7,500,000 Loan of 1813		At the pleasure of the United States after January 1, 1826.
$10,000,000 Loan of 1814		At the pleasure of the United States after December 31, 1826.
$6,000,000 Loan of 1814		At the pleasure of the United States after December 31, 1826.
Undesignated Loan of 1814		At the pleasure of the United States after December 31, 1826.
Treasury Note Stock of 1815.		At the pleasure of the United States after December 31, 1824.
7% Stock of 1815		At the pleasure of the United States after December 31, 1824.
6% Loan of 1815		At the pleasure of the United States after December 31, 1827.
5% Loan of 1816		At the pleasure of the United States.
5% Loan of 1820		At the pleasure of the United States after January 1, 1832.
6% Loan of 1820		At the pleasure of the United States.
5% Loan of 1821		At the pleasure of the United States after January 1, 1835.
Exchanged 5% Stock of 1822.		At the pleasure of the United States, after 6 months' public notice, one-third after December 31, 1830, one-third after December 31, 1831, and the remainder after December 31, 1832.
First 4½% Loan of 1824		At the pleasure of the United States after January 1, 1832.
Exchanged 4½% Stock of 1824.		At the pleasure of the United States, after 6 months' public notice, one-half after December 31, 1832, and the remainder after December 31, 1833.
Second 4½% Loan of 1824		At the pleasure of the United States after December 31, 1831.
Exchanged 4½% Stock of 1825.		At the pleasure of the United States, after 6 months' public notice, one-half after December 31, 1828, and the remainder after December 31, 1829.
Loan of 1841		At the pleasure of the United States after December 31, 1844.
Loan of 1842		At the pleasure of the United States after twenty years from December 31, 1842.
Loan of 1843		At the pleasure of the United States after the expiration of ten years after June 30, 1843.
Mexican Indemnity Stock		At the pleasure of the United States at any time after August 9, 1851.

Government stocks and bonds containing redemption provisions—Con.

Loan	Date of Maturity	Date of Redeemability
Loan of 1847		At the pleasure of the United States after December 31, 1867.
Bounty Land Scrip		At the pleasure of the United States.
Loan of 1848		At the pleasure of the United States after July 1, 1868.
Texas Indemnity Stock (1851).		After December 31, 1864.
Loan of 1858		At the pleasure of the United States after the expiration of fifteen years, after January 1, 1859.
Loan of 1860		After January 1, 1871.
Loan of February 1861		At the pleasure of the United States after December 31, 1880.
Oregon War Debt		At any time after July 1, 1881.
Loan of July and August 1861.		At the pleasure of the United States after June 30, 1881.
Five-Twenties of 1862	May 1, 1882	At the pleasure of the United States after April 30, 1867.
Loan of 1863		At the pleasure of the United States after June 30, 1881.
Ten-Forties of 1864	March 1, 1904	At the pleasure of the United States after February 28, 1874.
Five-Twenties of March 1864.	November 1, 1884	At the pleasure of the United States after October 31, 1869.
Five-Twenties of June 1864.	November 1, 1884	At the pleasure of the United States after October 31, 1869.
Five-Twenties of 1865	November 1, 1885	At the pleasure of the United States after October 31, 1870.
Consols of 1865	July 1, 1885	At the pleasure of the United States after July 1, 1870.
Consols of 1867	July 1, 1887	At the pleasure of the United States after July 1, 1872.
Consols of 1868	July 1, 1888	At the pleasure of the United States after July 1, 1873.
5% Loan of 1881 (issued in 1871, 1872, 1874, 1875, 1876, 1877).		At the pleasure of the United States after May 1, 1881.
4½% Loan of 1891 (issued in 1877, 1878, 1879).		At the pleasure of the United States after September 1, 1891.
4% Loan of 1907 (issued in 1878, 1879, 1880).		At the pleasure of the United States after July 1, 1907.
Loan of July 12, 1882		At the pleasure of the United States after all bonds bearing a higher rate of interest which were redeemable had been redeemed or called.
Loan of 1904 (issued in 1894).		At the pleasure of the United States after February 1, 1904.
Loan of 1925 (issued in 1896).		At the pleasure of the United States after February 1, 1925.
Loan of 1908-1918 (issued in 1898).	August 1, 1918	At the pleasure of the United States after August 1, 1908.
2% Consols of 1930 (issued in 1900).		At the pleasure of the United States after April 1, 1930.
2% Panama Canal Loan of 1916-1936.	August 1, 1936	At the pleasure of the United States after ten years from August 1, 1906.

Government stocks and bonds containing redemption provisions—Con.

Loan	Date of Maturity	Date of Redeemability
2% Panama Canal Loan of 1918–1938.	November 1, 1938	At the pleasure of the United States after ten years from November 1, 1908.
2½% Postal Savings Bonds (first series was issued in 1912; total of 49 series was issued).	20 years from date	At the pleasure of the United States on and after one year from date.
First Liberty Loan Bonds of 1932–1947 (First 3½'s, First 4's, First 4¼'s, First-Second 4¼'s) (issued in 1917, 1918).	June 15, 1947	At the pleasure of the United States on or after June 15, 1932, on three months' notice.
Second Liberty Loan Bonds of 1927–1942 (Second 4's, Second 4¼'s) (issued in 1917, 1918).	November 15, 1942	At the pleasure of the United States on and after November 15, 1927, on six months' notice.
Fourth Liberty Loan 4¼% Bonds of 1933–1938 (issued in 1918).	October 15, 1938	At the pleasure of the United States on and after October 15, 1933, on six months' notice.
4¼% Treasury Bonds of 1947–52 (issued in 1922).	October 15, 1952	At the option of the United States on and after October 15, 1947, on four months' notice.
4% Treasury Bonds of 1944–54 (issued in 1924).	December 15, 1954	At the option of the United States on and after December 15, 1944, on four months' notice.
3¾% Treasury Bonds of 1946–56 (issued in 1926).	March 15, 1956	At the option of the United States on and after March 15, 1946, on four months' notice.
3½% Treasury Bonds of 1943–47 (issued in 1927).	June 15, 1947	At the option of the United States on and after June 15, 1943, on four months' notice.
3¼% Treasury Bonds of 1940–43 (issued in 1928).	June 15, 1943	At the option of the United States on and after June 15, 1940, on four months' notice.
3¼% Treasury Bonds of 1941–43 (issued in 1931).	March 15, 1943	At the option of the United States on and after March 15, 1941, on four months' notice.
3½% Treasury Bonds of 1946–49 (issued in 1931).	June 15, 1949	At the option of the United States on and after June 15, 1946, on four months' notice.
3% Treasury Bonds of 1951–55 (issued in 1931).	September 15, 1955	At the option of the United States on and after September 15, 1951, on four months' notice.
3¼% Treasury Bonds of 1943–45 (issued in 1933).	October 15, 1945	At the option of the United States on and after October 15, 1943, on four months' notice.
3¼% Treasury Bonds of 1944–46 (issued in 1934).	April 15, 1946	At the option of the United States on and after April 15, 1944, on four months' notice.
3% Treasury Bonds of 1946–48 (issued in 1934).	June 15, 1948	At the option of the United States on and after June 15, 1946, on four months' notice.
3¼% Treasury Bonds of 1949–52 (issued in 1934).	December 15, 1952	At the option of the United States on and after December 15, 1949, on four months' notice.

Government stocks and bonds containing redemption provisions—Con.

Loan	Date of Maturity	Date of Redeemability
2¾% Treasury Bonds of 1955–60 (issued in 1935).	March 15, 1960	At the option of the United States on and after March 15, 1955, on four months' notice.
2¾% Treasury Bonds of 1945–47 (issued in 1935).	September 15, 1947	At the option of the United States on and after September 15, 1945, on four months' notice.
2¼% Treasury Bonds of 1948–51 (issued in 1936).	March 15, 1951	At the option of the United States on and after March 15, 1948, on four months' notice.
2¼% Treasury Bonds of 1951–54 (issued in 1936).	June 15, 1954	At the option of the United States on and after June 15, 1951, on four months' notice.
2¼% Treasury Bonds of 1956–59 (issued in 1936).	September 15, 1959	At the option of the United States on and after September 15, 1956, on four months' notice.
2½% Treasury Bonds of 1949–53 (issued in 1936).	December 15, 1953	At the option of the United States on and after December 15, 1949, on four months' notice.

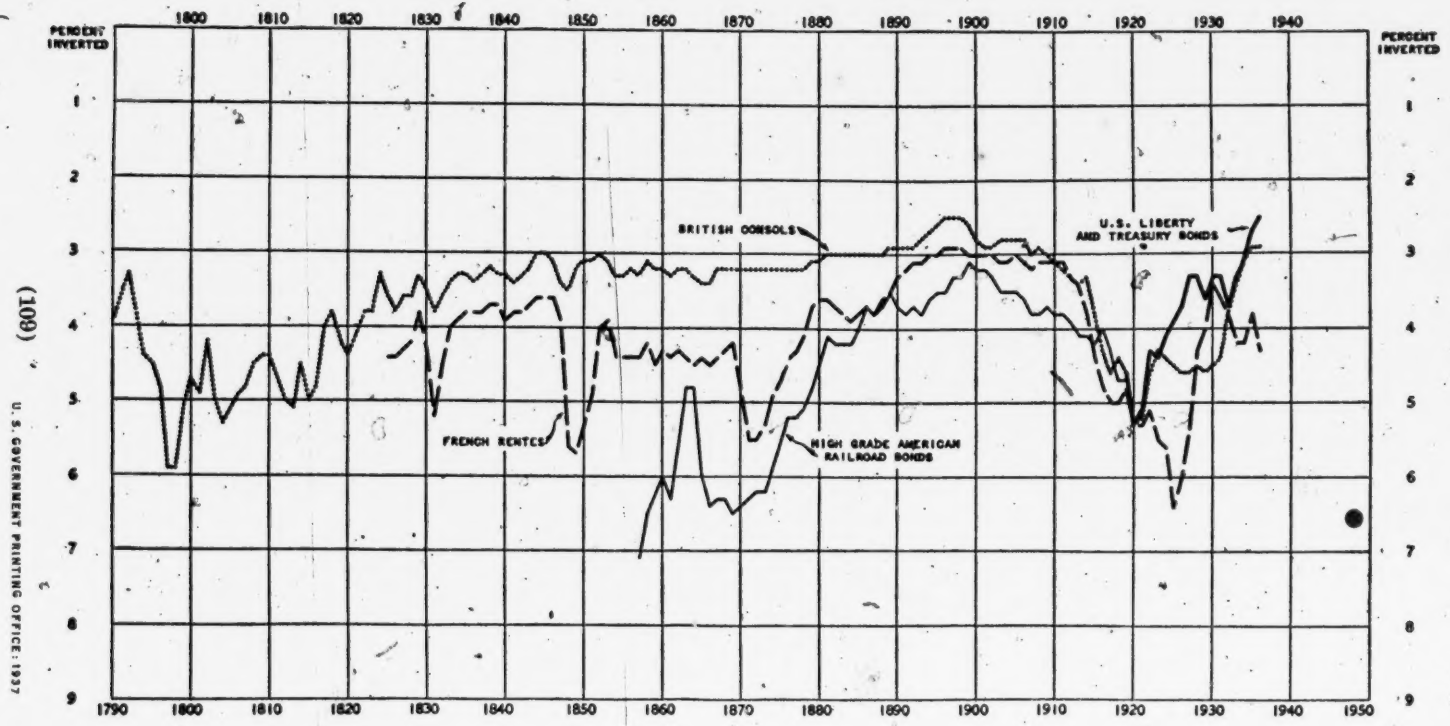
Treasury notes containing redemption provisions

Series	Date of Maturity	Date of Redeemability
Treasury Notes of 1815	----------	At the pleasure of the United States.
Small Treasury Notes of 1815.	----------	At the pleasure of the United States.
Treasury Notes of 1840	1 year after issue	On sixty days' notice.
3¾% and 4¼% Convertible Gold Notes of 1922–1923 (Victory).	May 20, 1923	At the option of the United States on June 15 or December 15, 1922, on four months' notice.
3½% Treasury Notes, Series A—1930–32 (issued in 1927).	March 15, 1932	At the option of the United States on and after March 15, 1930, on six months' notice.
3½% Treasury Notes, Series B—1930–32 (issued in 1927).	September 15, 1932	At the option of the United States on and after September 15, 1930, on six months' notice.
3½% Treasury Notes, Series C—1930–32 (issued in 1928).	December 15, 1932	At the option of the United States on and after December 15, 1930, on six months' notice.

APPENDIX B

YIELDS OF HIGH GRADE BONDS

Annually, 1790 to 1936



See No. 42 for U. S. brief

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 198

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ARTHUR W. MACHEN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 5, 1937
CERTIORARI GRANTED OCTOBER 11, 1937

SUPREME COURT OF THE UNITED STATES

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1 [Caption omitted.]

2 In United States District Court, District of Maryland

No. 5816 At Law

ARTHUR W. MACHEN

vs.

THE UNITED STATES OF AMERICA

Docket entries

1935

Dec. 30. Petition of Arthur W. Machen filed. (Service admitted by by U. S. Attorney.),

" " Affidavit of mailing copy of petition to Attorney General of U. S. and of service on U. S. Atty. filed.

1936

Feb. 28. Answer of United States of America filed.

June 20. Case tried before Court (Coleman, J.) without a jury.

" " Stipulation of facts filed.

" " Supplemental Stipulation of Facts filed.

" " Plaintiff's (6) prayers filed.

" " Verdict for the Defendant.

" " Judgment on Verdict nisi.

" 23. Judgment on Verdict absolute in favor of the Defendant.

" " Testimony and Opinion of Court filed.

" " Court's Findings of Facts and Conclusions of Law filed.

July 6. Petition of Plaintiff for allowance of appeal to the U. S. Cir. Ct. of Appeals and Order of Court allowing Appeal as prayed and fixing the penalty of the appeal bond in the sum of $300 filed.

" " Assignment of Errors filed.

" " Bonds approved and filed.

" " Citation issued retble. within forty days.

3 " 21. Stipulation of counsel as to making up record on appeal filed.

" 23. Petition of Plaintiff and Order of Court extending the time for filing the record and docketing this cause in the Cir. Ct. of Appeals for thirty days after August 15th, 1936, filed.

" 31. Bill of Exceptions filed.

IN UNITED STATES DISTRICT COURT

[Title omitted.]

Petition of Arthur W. Machen for entry of judgment, etc.

Filed December 30, 1935

To the honorable, the Judges of the District Court of the United States for the District of Maryland:

The petition of Arthur W. Machen, of Baltimore County in the State of Maryland, respectfully shows:

1. That your Petitioner is a *citizen of the United* States and of the State *of Maryland*, and a resident of Baltimore County in said State.

2. That on or about the 23rd day of March 1933, your Petitioner, in reliance upon the good faith of the United States, which (as hereinafter more fully shown) turned *out to* be, so far as the executive and legislative departments of the said United States are concerned, bad faith, purchased and has ever since held and owned, and now holds and owns, a coupon bond of the United States, commonly known as a First Liberty 3½ Bond of the denomination of $1,000.00, No. 47084, bearing interest, free from all State and Federal taxes, except estate or inheritance taxes, at the rate of 3½% per annum, payable semiannually on the 15th days of June and December in each year until the 15th day of June 1947, unless said bond should be redeemed in the meantime, pursuant *to the terms thereof* and of the Act of Congress under which it was issued.

4 3. That said bond, together with other bonds of like tenor and effect, were issued under and pursuant to an Act of Congress entitled "An Act to authorize an issue of bonds to meet expenditures for the national security and defense, and for the purpose of assisting in the prosecution of the war, to extend credit to foreign governments, and for other purposes." (Act of April 24, 1917, c. 4, Sec. 1, 40 Stat. 35.)

4. That pursuant to the terms of said Act of Congress, the Secretary of the Treasury fixed the rate of interest and dates of maturity and redemption of said series of bonds issued thereunder and caused bonds to be issued to patriotic and confiding citizens of the United States to a very large amount, all of which were of like tenor and *effect as those of the bond* so owned by your Petitioner, which reads as follows:

LIBERTY LOAN OF 1917

The United States of America for value received promises to pay to Bearer the sum of One thousand dollars on the 15th day of June 1947 with interest at the rate of three and one half per centum per annum payable semiannually on December 15 and June 15 in each year until the principal hereof shall be payable. The principal and interest of this bond shall be payable in United States gold coin of the present standard of value and shall be exempt both as to principal and interest from all taxation except estate or inheritance taxes imposed by authority of the United States, or its possessions or by any State or local taxing authority. This bond shall not bear the circulation privilege. This bond is one of a series of $2,000,000,000. principal amount of bonds of an issue of $5,000,000,000. authorized by an Act of Congress entitled "An Act to authorize an issue to meet expenditures for the national security and defense and for the purpose of assisting in the prosecution of the war, to extend credit to foreign governments, and for other purposes", approved April 24, 1917. Bonds of different denominations, and coupon and registered bonds of said series are interchangeable, in equal principal amounts

under regulations of the Treasury Department, and upon payment, if the Secretary of the Treasury shall require, of a charge not
5 exceeding $1 for each bond issued. All or any of the bonds of this series of which this is one may be redeemed and paid, at the pleasure of the United States on or after June 15, 1932, on any semiannual interest payment date or dates at the par value thereof and interest accrued at the date of redemption on notice published at least three months prior to the redemption date and published thereafter from time to time during said three months period as the Secretary of the Treasury shall direct. If in any case less than all of the bonds of said series are to be redeemed the bonds to be redeemed shall be determined by lot by such method as may be prescribed by the Secretary of the Treasury. From the date of redemption designated in any such notice interest on the bonds called for redemption shall cease, and all coupons maturing after said date shall be void. If any subsequent series of bonds (but not including United States certificates of indebtedness and other short term obligations) shall be issued by the United States at a higher rate of interest than three and one half per centum per annum before the termination of the war between the United States and the Imperial German Government the date of such termination to be fixed by proclamation of the President of the United States the holder hereof shall have the privilege at any time within six months after the issue of bonds of such subsequent series the date of such issue to be fixed by prior public announcement by the Secretary of the Treasury of converting this bond at par upon presentation and surrender hereof with all unmatured coupons at the Treasury Department, Washington, or at such other agencies as the Secretary of the Treasury may hereafter designate for the purpose and upon adjustment of accrued interest to the date of conversion into an equal amount of bonds bearing such higher rate of interest and substantially identical with the bonds of such subsequent series except that the bonds issued upon such conversion shall be identical with the bonds of the present series as to maturity of principal and of interest and terms of redemption.

W. G. McAdoo,
Secretary of the Treasury.

Washington, D. C., *June 15, 1917.*

6 5. That said bond, like other bonds of the said series, provided, in accordance with the requirement of the Act of Congress under which they were issued, that "The principal and interest of this bond shall be payable in gold coin of the United States of the present standard of value."

6. That until the inauguration of the present President of the United States, his Excellency Franklin Delano Roosevelt, the United States, both in times of war and peace, of prosperity and depression, duly paid the interest on said bonds in currency freely exchangeable for gold coin of the United States of said standard of value or on the demand of any holder in gold.

7. That on the 5th day of June 1933 the President approved a *Joint Resolution* of Congress (48 Stat. 112) popularly (and aptly) known as the Repudiation Act whereby, craftily and subtly contriving and intending to repudiate the obligations of the United States and to deprive your Petitioner and other holders of bonds of the United States of property without due process of law in violation of the Fifth Amendment and to repudiate the provision of the Fourteenth Amendment that "the validity of the public debt of the United States authorized by law shall not be questioned", it was provided *inter alia* that—

"Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; * * * Every obligation heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law."

8. Subsequently the Congress of the United States, with the
7 approval of the President, passed sundry Acts intended and designed more fully to effectuate the repudiation of obligations of the United States. Gold was wholly withdrawn from circulation and the coinage thereof prohibited. The theoretic gold content of the dollar was reduced from 25.8 grains to 15 5/21sts grains, but for all practical purposes it was reduced to zero, as the executive and legislative departments of the Government, pursuant to the same policy of repudiation, confiscation, and tyranny, will not issue to the holders of bonds such as your Petitioner's any gold whatsoever. Thereafter the currency of the United States became and was an irredeemable paper currency without any actual or intrinsic value whatsoever, commonly known as "boloney dollars."

9. On the 18th day of February 1935 the Supreme Court of the United States held the abovementioned resolution of June 5, 1933, in so far as it undertook to nullify gold clauses and obligations of the United States similar to that held by your Petitioner, and in so far as it provided that such obligations shall be discharged for payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts, to be unconstitutional. Nevertheless, the executive and legislative departments of the United States, so far from observing or attempting to observe the solemn declaration and decision of the Supreme Court, embarked upon a policy of attempting, in violation of their respective oaths of office, to nullify and evade the constitutional obligations of the Republic.

10. Pursuant to this policy, on the 22nd day of April 1935, Henry Morgenthau, Jr., Secretary of the Treasury, issued a call for redemption before maturity of all bonds of the series held by your Petitioner in the words and figures following:

8 REDEMPTION OF FIRST LIBERTY LOAN BONDS

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, April 22, 1935.

1935
Department Circular No. 535.
Public Debt Service.

To Holders of First Liberty Loan Bonds of 1932–47 and Others Concerned:

1. NOTICE OF CALL FOR REDEMPTION BEFORE MATURITY.

On March 14, 1935, the following public notice of call for redemption was given:

To Holders of First Liberty Loan Bonds of 1932–47 and Others Concerned:

Public Notice is hereby given:

1. All outstanding First Liberty Loan bonds of 1932–47 are hereby called for redemption on June 15, 1935. The various issues of First Liberty Loan bonds (all of which are included in this call) are as follows:

First Liberty Loan 3½% per cent bonds of 1932–47 (First 3½'s), dated June 15, 1917;

First Liberty Loan Converted 4 percent bonds of 1932–47 (First 4's), dated November 15, 1917;

First Liberty Loan Converted 4¼ per cent bonds of 1932–47 (First 4¼'s), dated May 9, 1918; and

First Liberty Loan Second Converted 4¼ percent bonds of 1932–47 (First-Second 4¼'s), dated October 24, 1918.

2. Interest on all such outstanding First Liberty Loan bonds will cease on said redemption date, June 15, 1935.

3. Full information regarding the presentation and surrender of First Liberty Loan bonds for redemption under this call will be given in a Treasury Department circular to be issued later.

4. Holders of First Liberty Loan bonds now called for redemption on June 15, 1935, may, in advance of that date, be offered the privilege of exchanging all or any part of their called bonds for
9 other interest-bearing obligations of the United States, in which even public notice will hereafter be given.

HENRY MORGENTHAU, JR.,
Secretary of the Treasury.

TREASURY DEPARTMENT,
Washington, March 14, 1935.

Said call was not intended to be, and was not in fact, a call for payment in the medium required by the Constitution and by the

contract between your Petitioner and the United States. On the contrary, the call contemplated payment not in gold dollars or in any real dollars whatsoever, but in boloney dollars as aforesaid, and your Petitioner is advised and therefore charges that said attempted call was and is unconstitutional, null and void, and a deliberate attempt to evade and nullify the Constitution of the United States.

11. Your Petitioner refused to surrender his said bond pursuant to said illegal and unconstitutional attempted call. On the 15th day of December 1935, a coupon on said bond, according to its terms, fell due, which said coupon is in the words and figures following:

"37. The United States of America will pay to bearer ($17.50) seventeen dollars and fifty cents for six months interest due on the fifteenth day of Dec. on $1,000 3½ per cent bond of Liberty Loan of 1917. Houston B. Teehee, Register of the Treasury. 1209332."

12. The United States has refused to pay said coupon even in boloney dollars, claiming that the aforesaid attempted call is valid. Your Petitioner accepts, though under protest, the decision of the Supreme Court of the United States that, in the absence of proof that the boloney dollars are less in purchasing power than real dollars or gold dollars as required by the contract, your Petitioner is entitled to no more than nominal damages for the breach of contract by the United States; but your Petitioner is advised that when the United States undertakes to call the bonds in advance of maturity the burden rests upon the Government to show that it has complied strictly with the terms of the contract and was ready and willing to pay the principal according to the terms of the bond; that it has not done so, but has called the bonds for payment in boloney dollars and not in gold coin of the United States of the standard of value existing in 1917; that the Defendant, being in default at the time of said attempted call, was not in a position to call the bonds before maturity; and that said attemped call is therefore in law no call at all, and therefore the obligation to pay interest continues.

13. As further evidence of the unlawful conspiracy of the executive and legislative departments of the Defendant to oppress and injure your Petitioner and other holders of obligations of the United States, your Petitioner refers to Joint Resolution No. 63 of the 74th Congress approved August 27, 1935.

Wherefore Your Petitioner Prays that this Honorable Court may enter a judgment in his favor against the United States of America in the sum of $17.50, and that your Petitioner may have such other and further relief as to the Court may seem just and right.

ARTHUR W. MACHEN.

H. VERNON ENEY,
ALEXANDER GORDON, III,
Attorneys for Petitioner.

[*Duly sworn by Arthur W. Machen, jurat omitted in printing.*]

Memorandum: Affidavit of mailing copy of petition to Attorney General of U. S. and of service on U. S. Attorney filed in Court 30th December, 1935.

11 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Answer of defendant

Filed February 28, 1936

To the Honorable, the Judges of said Court:

The United States of America, Defendant, by Bernard J. Flynn, United States Attorney, for answer to the Plaintiff's petition herein, says:

First. That the Defendant is without knowledge of the facts alleged in paragraph 1 and neither affirms nor denies the same but leaves the Petitioner to full proof thereof.

Second. That the Defendant denies each and all allegations in paragraph 2 except that reference is made to the alleged bond for the contents thereof; and except that Defendant is without knowledge or information with respect to and therefore denies the allegations concerning the ownership of a coupon bond and the facts upon which the Plaintiff relied in making the alleged purchase.

Third. That the Defendant is without knowledge or information with respect to and therefore denies the allegations contained in paragraph 3 except that Defendant admits that First Liberty Loan 3½% bonds were issued by the United States under the authority of an Act approved April 24, 1917; and except that reference is made to said bonds for the contents thereof.

Fourth. That as to the allegations contained in paragraph 4 of the petition herein the Defendant is without knowledge or information with respect to the ownership by the Plaintiff at any time of any one or more bonds issued pursuant to said Act of Congress and, therefore, denies the same, except that the Defendant denies that the tenor and effect of such bonds issued pursuant to said Act of Congress were as alleged and except that reference is made to such bonds for the contents thereof.

12 Fifth. That the Defendant is without knowledge or information with respect to and therefore denies the allegations in paragraph 5 except that it is admitted that First Liberty Loan 3½% Bonds contained the provision that "the principal and interest of this bond shall be payable in United States gold coin of the present standard of value."

Sixth. That the Defendant denies each and all the allegations contained in paragraph 6 except that it is admitted that the Defendant at all times has duly paid its interest obligation on First Liberty Loan 3½% bonds.

Seventh. That the Defendant denies each and all allegations of fact contained in said paragraph except that it is admitted that on June 5, 1933, the President approved a Joint Resolution of Congress (48 Stat. 112) to which reference is made for the contents thereof.

Eighth. That the Defendant denies each and all allegations of fact contained in paragraph 8 and as to the remaining allegations states that they are conclusions of law requiring no answer.

Ninth. That the Defendant denies each and all allegations of fact contained in paragraph 9 and as to the remaining allegations states that they are conclusions of law requiring no answer.

Tenth. That the Defendant denies each and all allegations of fact contained in paragraph 10 except that it is admitted that under date of April 22, 1935, the Secretary of the Treasury of the United States issued Treasury Department Circular No. 535, which contained in part the words and figures given in paragraph 10; and except that reference is made to said Treasury Department Circular for the contents thereof; and as to the remaining allegations the Defendant states that they are conclusions of law requiring no answer.

Eleventh. That the Defendant denies each and all allegations of fact contained in paragraph 11 except that the defendant is without knowledge or information sufficient to form a belief as to the Petitioner's refusal to surrender his bond and as to the terms of the alleged coupon; and as to the remaining allegations the Defendant states that they are conclusions of law requiring no answer.

13 Twelfth: That the Defendant denies each and all allegations of fact contained in paragraph 12 and as to the remaining allegations states that they are conclusions of law requiring no answer; and except that reference is made to Treasury Department Circular No. 535 for the contents thereof.

Thirteenth: That paragraph 13 contains no allegations of fact or law and therefore requires no answer.

In further answer to the said petition, this Defendant denies that the Petitioner is entitled to any recovery herein and for additional grounds of defense on the part of the Defendant, says:

1. That the Petitioner held no license and was not authorized to acquire, transport, melt or treat, import, export, or earmark or hold in custody for foreign or domestic account, gold in any form on January 30, 1934, or at any time subsequent to that date.

2. That the Petitioner has not surrendered or offered to surrender or presented for payment the First Liberty Loan 3½% Bond, No. 47084, of which he alleges to be the owner.

3. That the Petitioner has not surrendered or offered to surrender or presented for payment the coupon of which he alleges to be the owner in paragraph 11 of his petition.

And having fully answered the said petition this Defendant prays to be hence dismissed with its proper costs.

BERNARD J. FLYNN,
United States Attorney.
C. ROSS MCKENRICK,
Assistant United States Attorney.

14 In United States District Court

[Title omitted.]

Findings of facts and conclusions of law

Filed June 23, 1936

Findings of facts

I find the facts in this case to be as set forth in the Stipulation of Facts filed herein during the course of the trial and in the supplemental Stipulation filed herein at the conclusion of the hearing.

Conclusions of law

On the authority of Perry v. United States, 294 U. S. 330, and Morgan v. The United States, 113 U. S. 476, I find that the Plaintiff has no right to recover in the present suit, and that such right, if any, to recover, must be in accordance with the rule laid down in the Perry case.

I consider it unnecesessary at this time, in view of the statements which I have made in the course of the argument, and in view of the Supreme Court's decisions, to render any further opinion.

WILLIAM C. COLEMAN,
United States District Judge.

Thereupon, to wit, on the 20th day of June, 1936, the Court directed in open Court the entry of a verdict for the Defendant.

In United States District Court

Verdict

June 20, 1936—Verdict for the defendant

In United States District Court

Judgment

June 23, 1936—Judgment on verdict absolute in favor of the Defendant.

15 In United States District Court for the District of Maryland

Law No. 5816

ARTHUR W. MACHEN
vs.
UNITED STATES OF AMERICA

Bill of exceptions

Filed July 31, 1936

Be it remembered that on the trial of this cause in the June Term 1936 of this Court, the Honorable William C. Coleman presiding, the following proceedings were had, to wit:

The Plaintiff to sustain the issues on his part offered the following stipulation of facts:

Stipulation of facts

[Title omitted.]

It is hereby stipulated by and between the plaintiff, Arthur W. Machen, and the defendant, the United States of America, that the facts hereinbelow stated are true and may be deemed to have been proved by proper evidence. It is further stipulated that the papers hereinbelow described and attached hereto are true and correct copies of the originals, and that such copies may be used on trial of the above-entitled action to the same effect as if the originals thereof were produced and proved. Each party, however, reserves the right to object to the materiality or relevancy of any of said facts and of any of said papers or their contents, and reserves the right to introduce other and further evidence not inconsistent with the facts herein stipulated.

I

Exhibit "A" is a true copy of the text of a $1,000 First Liberty Loan 3½% Bond of the United States authorized by an Act of Congress approved April 24, 1917, and of the bond which the plaintiff alleges he owns.

16

II

Exhibit "B" is a true copy of the text of an interest coupon attached to a $1,000 First Liberty Loan 3½% Bond and of the coupon attached to the bond which the plaintiff alleges he owns.

III

Exhibit "C" is a true copy of Treasury Department Circular No. 78, dated May 14, 1917.

IV

Exhibit "D" is a true copy of the Notice of Call by the Secretary of the Treasury for redemption of First Liberty Loan Bonds of 1932–1947, published on March 14, 1935, and published thereafter from time to time during the period from March 14, 1935, to June 15, 1935, as directed by the Secretary of the Treasury and as provided in the bond.

V

Exhibit "E" is a true copy of Treasury Department Circular No. 535, dated April 22, 1935.

VI

The plaintiff held no license to acquire, transport, melt, or treat, import, export, or earmark, or hold in custody for foreign or domestic account, gold in any form on March 6, 1933, or at any time subsequent to that date.

VII

Upon proper presentation and surrender on and after June 15 1935, the United States redeemed all First Liberty Loan 3½% Bonds tendered and surrendered for redemption pursuant to the notice of call referred to in paragraph IV above by payment of legal tender currency in amounts equal to the face amounts of the bonds so tendered and surrendered for redemption, but the Treasury Department refused to pay gold coin therefor. The plaintiff has not surrendered or offered to surrender or presented for payment the First Liberty Loan 3½% Bond No. 47084, which he alleges he owns. The Treasurer of the United States and other officers and fiscal
17 agents of the United States have not at any time been directed by the Secretary of the Treasury to redeem any bonds of said series by payment in gold coin or in any manner other than as above stated, but have been authorized and directed to redeem in the manner above stated any and all such bonds duly presented and surrendered.

VIII

No interest coupon bearing the date of December 15, 1935, which had been attached to a First Liberty Loan 3½% Bond referred to in the notice of call mentioned in Paragraph IV above, has been paid by the Treasury Department. The plaintiff has not surrendered or offered to surrender or presented for payment the coupon formerly attached to the First Liberty Loan 3½% Bond No. 47084, which he alleges he owns. Neither the Treasurer nor any other officer or any fiscal agent of the United States has been instructed by the Secretary of the Treasury to pay any coupon bearing a date subsequent to June 15, 1935, which had been attached to a First Liberty Loan 3½% bond and payment of such coupons bearing a date subsequent to June 15, 1935, as were presented for payment was refused by the Treasury Department upon the ground that the bonds had been called for redemption on June 15, 1935.

IX

As used in this stipulation the phrase "legal tender currency" means all currencies and coins of the United States referred to in paragraph 2 of the Joint Resolution of Congress dated June 5, 1933, except gold.

H. VERNON ENEY,
ALEXANDER GORDON, III
Attorneys for Plaintiff.
BERNARD J. FLYNN,
U. S. Attorney.

18 *Exhibit "A" to stipulation*

First 3½'s—Coupon

THE UNITED STATES OF AMERICA

For value received promises to pay to the bearer the sum of one thousand dollars on the 15th day of June 1947, with interest at the rate of three and one-half per centum per annum payable semi-annually on December 15 and June 15 in each year until the principal hereof shall be payable, upon presentation and surrender of the interest coupons hereto attached as they severally mature. The principal and interest of this bond shall be payable in United States gold coin of the present standard of value, and shall be exempt, both as to principal and interest, from all taxation, except estate or inheritance taxes, imposed by authority of the United States, or its possessions, or by any State or local taxing authorities. This bond shall not bear the circulation privilege. This bond is one of a series of $2,000,000,000, principal amount of bonds, of an issue of $5,000,000,000 authorized by an Act of Congress, entitled "An Act To authorize an issue of bonds to meet expenditures for the national security and defense, and, for the purpose of assisting in the prosecution of the war, to extend credit to foreign governments, and for other purposes", approved April 24, 1917. Bonds of different denominations, and coupon and registered bonds, of said series, are interchangeable, in equal principal amounts, under regulations of the Treasury Department, and upon payment, if the Secretary of the Treasury shall require, of a charge not exceeding $1 for each new bond issued. All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, on any semi-annual interest payment date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date and published thereafter from time to time during said three months' period as the Secretary of the Treasury shall direct. If in any case less than all of the bonds of

19 said series are to be redeemed, the bonds to be redeemed will be determined by lot by such method as may be prescribed by the Secretary of the Treasury. From the date of redemption designated in any such notice, interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void. If any subsequent series of bonds (not including United States certificates of indebtedness and other short term obligations) shall be issued by the United States at a higher rate of interest than three and one-half percentum per annum before the termination of the war between the United States and the Imperial German Government, the date of such termination to be fixed by proclamation of the President of the United States, the holder hereof shall have the privilege, at any time within six months after

the issue of bonds of such subsequent series, the date of such issue to be fixed by prior public announcement by the Secretary of the Treasury, of converting this bond at par, upon presentation and surrender hereof with all unmatured coupons, at the Treasury Department, Washington, or at such other agencies as the Secretary of the Treasury may hereafter designate for the purpose, and upon adjustment of accrued interest to the date of conversion—into an equal par amount of bonds bearing such higher rate of interest, and substantially identical with the bonds of such subsequent series except that the bonds issued upon such conversion shall be identical with the bonds of the present series as to maturity of principal and of interest and terms of redemption.

W. M. McAdoo,
Secretary of the Treasury.

Washington, *D. C., June 15, 1917.*
Recorded: ------ Examined ------
Houston B. Teehee,
Register of the Treasury.

20 *Exhibit "B" to stipulation*

37. The United States of America Will Pay to Bearer ($17.50) Seventeen Dollars and fifty cents for six months' interest due on the fifteenth day of Dec. 1935, on $1000 3½ per cent Bond of Liberty Loan of 1917. Houston B. Teehee, Register of the Treasury. 00000.
Memo: Exhibit "C" omitted pursuant to Stipulation of Counsel.

Exhibit "D" to stipulation

First Liberty Loan Bonds

Notice of Call for Redemption Before Maturity

To Holders of First Liberty Loan Bonds of 1932–47 and Others Concerned:

Public notice is hereby given:

1. All outstanding First Liberty Loan bonds of 1932–47 are hereby called for redemption on June 15, 1935. The various issues of First Liberty Loan bonds (all of which are included in this call) are as follows:

First Liberty Loan 3½ *percent bonds* of 1932–47 (First 3½'s), dated June 15, 1917;

First Liberty Loan Converted 4 percent bonds of 1932–47 (First 4's), dated November 15, 1917;

First Liberty Loan Converted 4¼ percent bonds of 1932–47 (First 4¼'s), dated May 9, 1918; and

First Liberty Loan Second Converted 4¼ percent bonds of 1932–47 (First-Second 4¼'s), dated October 24, 1918.

2. Interest on all such outstanding First Liberty Loan bonds will cease on said redemption date, June 15, 1935.

21 3. Full information regarding the presentation and surrender of First Liberty Loan bonds for redemption under this call will be given in a Treasury Department circular to be issued later.

4. Holders of First Liberty Loan bonds now called for redemption on June 15, 1935, may, in advance of that date, be offered the privilege of exchanging all or any part of their called bonds for other interest-bearing obligations of the United States, in which event public notice will hereafter be given.

HENRY MORGENTHAU, Jr.,
Secretary of the Treasury.

TREASURY DEPARTMENT,
Washington, March 14, 1935.

Exhibit "E" to Stipulation

REDEMPTION OF FIRST LIBERTY LOAN BONDS

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, April 22, 1935.

1935
Department Circular No. 535
Public Debt Service.

To Holders of First Liberty Loan Bonds of 1932–47, and Others Concerned:

I. NOTICE OF CALL FOR REDEMPTION BEFORE MATURITY

On March 14, 1935, the following public notice of call for redemption was given:

To Holders of First Liberty Loan Bonds of 1932–47, and Others Concerned:

Public Notice is hereby given:

1. All outstanding First Liberty Loan bonds of 1932–47 are hereby called for redemption on June 15, 1935. The various issues of First Liberty Loan bonds (all of which are included in this call) are as follows:

First Liberty Loan 3½ percent bonds of 1932–47 (First 3½'s), dated June 15, 1917;

First Liberty Loan Converted 4 percent bonds of 1932–47 (First 4's), dated November 15, 1917;

22 First Liberty Loan Converted 4¼ per cent bonds of 1932–47 (First 4¼'s), dated May 9, 1918; and

First Liberty Loan Second Converted 4¼ percent bonds of 1932–47 (First-Second 4¼'s), dated October 24, 1918.

2. Interest on all such outstanding First Liberty Loan bonds will cease on said redemption date, June 15, 1935.

3. Full information regarding the presentation and surrender of First Liberty Loan bonds for redemption under this call will be given in a Treasury Department circular to be issued later.

4. Holders of First Liberty Loan bonds now called for redemption on June 15, 1935, may in advance of that date, be offered the privilege of exchanging all or any part of their called bonds for other interest-bearing obligations of the United States, in which event public notice will hereafter be given.

HENRY MORGENTHAU, Jr.,
Secretary of the Treasury.

TREASURY DEPARTMENT,
Washington, March 14, 1935.

II. OPTIONAL EXCHANGE OFFERING

1. Holders of First Liberty Loan bonds, called for redemption on June 15, 1935, are offered the privilege, for a limited period beginning April 22, 1935, of exchanging all or any part of their called bonds, either (1) for 2⅞ percent Treasury Bonds of 1955–60, or (2) for 5-year 1⅝ percent Treasury Notes of Series A–1940, both bonds and notes being dated and bearing interest from March 15, 1935.

2. Full information concerning the optional exchange offering of Treasury bonds is set forth in Treasury Department Circular No. 536, and full information concerning the optional exchange offering of Treasury notes is set forth in Treasury Department Circular No. 537, both circulars being dated April 22, 1935. As the privilege of exchanging First Liberty Loan bonds will be accorded for a limited period only and may be terminated at any time without notice,
23 holders of First Liberty Loan bonds who desire to take advantage of either offering should act promptly, following the instructions given in the Treasury Department circulars referred to above, copies of which may be obtained from any Federal Reserve bank or branch, or from the Treasury Department, Washington, D. C.

III. RULES AND REGULATIONS GOVERNING REDEMPTION OF FIRST LIBERTY LOAN BONDS

Pursuant to the call for redemption, as set forth in Section I of this circular, the following rules and regulations are hereby prescribed to govern the presentation and surrender of First Liberty Loan bonds for redemption on June 15, 1935:

1. Payment of called bonds on June 15, 1935.—Holders of any outstanding First Liberty Loan bonds will be entitled to have such bonds redeemed and paid at par on June 15, 1935, with interest in full to.

that date. After June 15, 1935, interest will not accrue on any First Liberty Loan bonds.

2. Presentation and surrender of coupon bonds.—First Liberty Loan bonds in coupon form should be presented and surrendered to any Federal Reserve bank or branch, or to the Treasurer of the United States, Washington, D. C., for redemption on June 15, 1935. The bonds must be delivered at the expense and risk of holders (see par. 8 of this section) and should be accompanied by appropriate written advice (see Form P. D. 1435 attached hereto). Checks in payment of principal will be mailed to the address given in the form of advice accompanying the bonds surrendered.

3. Coupons dated June 15, 1935, which become payable on that date, should be detached from any First Liberty Loan bonds before such bonds are presented for redemption on June 15, 1935, and such coupons should be collected in regular course when due. All coupons pertaining to such bonds bearing dates subsequent to June 15, 1935, must be attached to any such bonds when presented for redemption, provided, however, if any such coupons are missing from bonds so presented for redemption the bonds nevertheless will be redeemed, but the full face amount of any such missing coupons will be deducted from the payment to be made on account of such
24 redemption, and any amounts so deducted will be held in the Treasury to provide for adjustments or refunds on account of such missing coupons as may subsequently be presented.[1]

4. Presentation and surrender of registered bonds.—First Liberty Loan bonds in registered form must be assigned by the registered payees or assigns thereof, or by their duly constituted representatives, in accordance with general regulations of the Treasury Department governing assignments, in the form indicated in the next paragraph hereof, and thereafter should be presented and surrendered to any Federal Reserve bank or branch, or to the Division of Loans and Currency, Treasury Department, Washington, D. C., for redemption on June 15, 1935. The bonds must be delivered at the expense and risk of holders (see par. 8 of this section) and should be accompanied by appropriate written advice (see Form P. D. 1436 attached hereto). In all cases checks in payment of principal and final interest due will be mailed to the address given in the form of advice accompanying the bonds surrendered.

5. If the registered payee, or an assignee holding under proper assignment from the registered payee, desires that payment of the principal and final installment of interest be made to him, the bonds should be assigned by such payee or assignee, or by a duly constituted representative, to "The Secretary of the Treasury for redemption." If it is desired for any reason that payment be made to some

[1] First 4's, First 4¼'s, and First-Second 4¼'s were originally issued in temporary form. The final coupon attached to such temporary bonds became due on December 15, 1919, June 15, 1920, and December 15, 1920, respectively. The holders of any such temporary bonds will receive all past due interest to June 15, 1935, when such bonds are redeemed pursuant to the call. Any coupons now attached to such temporary bonds should be detached and collected in regular course.

other person, without intermediate assignment, the bonds should be assigned to "The Secretary of the Treasury for redemption for the account of _____", inserting the name and address of the person to whom payment is to be made. A representative or fiduciary should not assign for payment to himself individually unless expressly authorized to do so by the instrument under which he is acting; he may, however, assign for payment to himself in his representative or fiduciary capacity.

6. Assignment in blank or other assignment having similar effect will be recognized, but in that event payment will be made to the person surrendering the bond for redemption, since under such assignment the bond becomes in effect payable to bearer. Assignments in blank or assignments having similar effect should be avoided, if possible, in order not to lose the protection afforded by registration.

7. Final interest due on June 15, 1935, on registered bonds of the First Liberty Loan will be paid with the principal in accordance with the assignments on the bonds surrendered. Transfers and exchanges involving registered bonds will be permitted up to the close of business on May 31, 1935, but not after that date.

8. Transportation of bonds.—Bonds presented for redemption under this circular must be delivered to a Federal Reserve bank or branch, or to the Treasury Department, Washington, D. C., at the expense and risk of the holder. Coupon bonds should be forwarded by registered mail insured or by express prepaid. Registered bonds bearing restricted assignments may be forwarded by registered mail, but registered bonds bearing unrestricted assignments should be forwarded by registered mail insured or by express. Facilities for transportation of bonds by registered mail insured may be arranged between incorporated banks and trust companies and the Federal Reserve banks, and holders may take advantage of such arrangements when available, utilizing such incorporated banks and trust companies as their agents. Incorporated banks and trust companies are not agents of the United States under this circular.

IV. TIME OF PRESENTATION OF CALLED BONDS FOR REDEMPTION

1. In order to facilitate the redemption of First Liberty Loan bonds on June 15, 1935, any such bonds should be presented and surrendered in the manner herein prescribed well in advance of that date, but not before May 15, 1935. Such early presentation by holders will assure prompt payment of principal when due. This is particularly important with respect to registered bonds, for payment cannot be made until registration shall have been discharged at the Treasury Department.

2. It will expedite redemption if the bonds are presented to Federal Reserve banks or branches and not direct to the Treasury Department.

3. As hereinbefore provided: (1) coupons due June 15, 1935, should be detached from any permanent coupon bonds when such

bonds are presented for redemption on that date, such coupons to be collected when due; and (2) final interest due on any registered bonds will be paid with the principal amount.

4. If First Liberty Loan bonds called for redemption on June 15, 1935, are to be presented for exchange for 2⅞ percent Treasury bonds of 1955–60, instructions given in Treasury Department Circular No. 536 should be followed; if to be presented for 1⅝ percent Treasury notes of series A–1940, instructions given in Treasury Department Circular No. 537 should be followed; if to be presented for redemption on June 15, instructions given in this circular should be followed.

V. GENERAL PROVISIONS

1. Any further information which may be desired regarding the redemption of First Liberty Loan bonds under this circular may be obtained from any Federal Reserve bank or branch or from the Treasury Department, Washington, D. C., where copies of the Treasury Department's regulations governing assignments also may be obtained.

2. As fiscal agents of the United States, Federal Reserve banks are authorized and requested to perform any necessary acts under this circular. The Secretary of the Treasury may at any time, or from time to time, prescribe supplemental or amendatory rules and regulations governing the matters covered by this circular, which will be communicated promptly to Federal Reserve banks.

HENRY MORGENTHAU, Jr.,
Secretary of the Treasury.

27 Memo: Pages 4 and 5 of this Exhibit omitted pursuant to Stipulation of Counsel.

The Plaintiff was thereupon called as a witness in his own behalf, and having been first duly sworn, was examined and testified as follows:

That he is a citizen of the United States and a resident of Baltimore County, State of Maryland. He is the holder and owner of a coupon dated December 15, 1935, formerly attached to a First Liberty Loan 3½% bond of the United States, as alleged in the petition. The said coupon was thereupon produced and received in evidence. By agreement of counsel for both parties, the coupon was immediately withdrawn and the copy of the coupon attached to the stipulation of facts as Exhibit B substituted in the place thereof.

The Plaintiff further testified that the aforementioned coupon was formerly attached to Bond No. 47084. The Bond No. 47084 was thereupon produced and received in evidence. By agreement of counsel for both parties, the bond was immediately withdrawn and the copy of the bond attached to the stipulation of facts as Exhibit A substituted in the place thereof.

The Plaintiff further testified that he purchased the bond in question on March 22, 1933, and paid 101-4/32nds. therefor. He bought the bond from the National City Company, and gave them his check

in dollars for the amount. He is still the holder of both the bond and the coupon.

The Plaintiff thereupon offered the following supplemental stipulation:

Supplemental stipulation

[Title omitted.]

It is hereby stipulated by and between the parties hereto that the Court shall find the facts set forth in the Stipulation of Facts filed herein and in addition find that the Plaintiff was at the time of the institution of this suit, and now is, a citizen of the United
28 States and a resident of the State of Maryland; that on March 22, 1933, the Plaintiff purchased the $1,000 First Liberty Loan 3½% bond of the United States, No. 47084, offered in evidence, paying therefor the sum of $1,011.25; that the Plaintiff since said time has continuously held and owned, and now holds and owns, the said bond and the coupons attached thereto, including the coupon dated December 15, 1935; and that Exhibits A and B attached to the Stipulation of Facts filed herein are respectively true copies of said bond and said coupon dated December 15, 1935.

Each party reserves the right to request the Court for other and further findings of facts.

H. VERNON ENEY,
ALEXANDER GORDON III,
Attorneys for Plaintiff.
BERNARD J. FLYNN,
United States Attorney.

Thereupon the Plaintiff rested, and the Defendant, not offering any evidence, likewise rested.

The case having been closed by both Plaintiff and Defendant, the Plaintiff thereupon submitted the following prayers:

Plaintiff's request for additional finding of fact

The Plaintiff requests the Court to find as an additional fact in this case that at the time of the issuance of the "Notice of Call for Redemption" by the Secretary of the Treasury, a copy of which is attached to the Stipulation of Facts filed herein and marked "Exhibit D", it was not the purpose of the United States to pay the bonds referred to in such notice on June 15, 1935, or thereafter, in gold. Refused (WCC).

Plaintiff's second request for ruling of law

The Plaintiff requests the Court to rule as a matter of law that under the finding of facts in this case, the Plaintiff is entitled to
29 recover from the Defendant in this suit the sum of $17.50 in legal tender currency of the United States and that, accordingly, judgment should be entered in this case in favor of the Plaintiff against the Defendant for the sum of $17.50. Refused (WCC).

Plaintiff's third request for ruling of law

The Plaintiff requests the Court to rule as a matter of law that the provisions of the First Liberty Loan 3½% bond owned by the Plaintiff and offered in evidence in this case gives to the Defendant as the obligor of said bond the privilege or option of redeeming said bond upon the giving of the notice specified therein and upon the payment of the face amount of said bond in United States gold coin of the standard of value existing on June 15th, 1917, and that upon refusal or unwillingness on the part of the United States to pay on June 15th, 1935, the face amount of said bond in gold coin of the United States of the standard of value existing as of June 15th, 1917, the said bond was not then redeemable by the United States and interest coupon thereto attached dated December 15th, 1935, became due and payable by the United States on December 15th, 1935, and that since the United States has not paid the said coupon due December 15th, 1935, the Plaintiff is entitled to recover the face amount thereof in legal tender currency of the United States. Refused (WCC).

Plaintiff's fourth request for ruling of law

The Plaintiff requests the Court to rule as a matter of law that under the finding of facts in this case, since the Defendant was not in readiness to redeem the bond owned by the Plaintiff offered in evidence on June 15th, 1935, by payment of the face amount thereof in gold coin of the United States of the standard of value existing on June 15th, 1917, the said bond owned by the Plaintiff was not redeemable by the United States on June 15th, 1935, and that, accordingly, the interest coupon attached to said bond dated December 15th, 1935, is now due and payable. Refused (WCC).

Plaintiff's fifth request for ruling of law

The Plaintiff requests the Court to rule as a matter of law that under the finding of facts in this case the Defendant was not entitled to redeem the bond owned by the Plaintiff and offered in evidence on June 15th, 1935, unless on and after June 15th, 1935, the Defendant was ready and willing to pay to the Plaintiff upon surrender of said bond the sum of $1,000.00 in gold coin of the United States containing 25.8 grains of gold, .9 fine to the dollar. Refused (WCC).

Plaintiff's sixth request for ruling of law

The Plaintiff requests the Court to rule as matter of law that under the terms of the First Liberty Loan 3½% bond mentioned in the evidence, and the coupons thereto attached, the Defendant is bound to pay the coupons as they severally mature until the 15th day of June 1947 unless the said bond should, prior to that time, be duly

called for redemption in accordance with its terms; that the condition calling the bond must, prior to maturity, be strictly complied with and that the call in the terms set forth in the Treasury's circular mentioned in the Stipulation is not sufficient, unless the same was made with the bona fide intention of paying the same at the date fixed for redemption in gold coin of the United States of the standard of value existing on June 15th, 1917, and that the Defendant having, in violation of its contract, withdrawn gold from circulation and prevented itself from complying with the condition, the Plaintiff is entitled to recover upon the coupon maturing December 15th, 1935, the cause of action in this case, the face amount thereof, to wit, the sum of $17.50. Refused (WCC).

Plaintiff's seventh request for ruling of law

The Plaintiff requests the Court to rule as a matter of law that the Defendant having, prior to the date of the attempted call mentioned in the Stipulation, repudiated its obligation to pay the bond mentioned in the evidence and the several coupons thereon, including the coupon sued upon in this case, in gold coin of the United States
31 of the standard of value existing on June 15th, 1917, the Defendant at the time of said attempted call had broken its contract and was in default and, therefore, could not take advantage of the provision of the bond authorizing its redemption prior to maturity; and, therefore, judgment should be entered for the Plaintiff in the face amount of the coupon sued upon. Refused (WCC).

Whereupon the Plaintiff in due course excepted to the rulings of the Court in rejecting and refusing to grant the Plaintiff's request for additional finding of fact and the Plaintiff's six requests for rulings of law.

The Court then, after argument by counsel for the Plaintiff and the Defendant, announced its ruling as follows:

Ruling of court

"On the authority of Perry v. United States, 294 U. S. 330, and Morgan v. The United States, 113 U. S. 476, I find that the Plaintiff has no right to recover in the present suit, and that such right, if any, to recover, must be in accordance with the rule laid down in the Perry case."

Thereupon the Plaintiff duly excepted to said ruling.

Order settling bill of exceptions

And now in furtherance of justice and that right may be done, the Plaintiff, Arthur W. Machen, tenders and presents the aforegoing as the bill of exceptions in this appeal from the action of the Court, and prays that the same may be settled and allowed and signed and

sealed by the Court and made a part of the Record, and the same is accordingly done this 31st day of July, 1936.

WILLIAM C. COLEMAN,
United States District Judge.

The aforegoing bill of exceptions is hereby approved.

H. VERNON ENEY,
ALEXANDER GORDON III,
Attorneys for Plaintiff.
BERNARD J. FLYNN,
United States Attorney.
C. ROSS MCKENRICK,
Asst. U. S. Attorney.

32 In United States District Court

Assignment of errors

Filed July 6, 1936

Comes now the appellant, and in connection with his petition for appeal in this proceeding, says, that in the record, in the proceedings, and in the final judgment therein manifest error has intervened, to the prejudice of the appellant, to wit:

1. The Court erred in rejecting and refusing to grant the "Plaintiff's Request for Additional Finding of Fact", which reads as follows:

"The Plaintiff requests the Court to find as an additional fact in this case that at the time of the issuance of the 'Notice of Call for Redemption' by the Secretary of the Treasury, a copy of which is attached to the Stipulation of Facts filed herein and marked 'Exhibit D', it was not the purpose of the United States to pay the bonds referred to in such notice on June 15, 1935, or thereafter, in gold."

2. The Court erred in rejecting and refusing to grant the "Plaintiff's Second Request for Ruling of Law", which reads as follows:

"The Plaintiff requests the Court to rule as a matter of law that under the finding of facts in this case, the Plaintiff is entitled to recover from the Defendant in this suit the sum of $17.50 in legal tender currency of the United States and that, accordingly, judgment should be entered in this case in favor of the Plaintiff against the Defendant for the sum of $17.50."

3. The Court erred in rejecting and refusing to grant the "Plaintiff's Third Request for Ruling of Law", which reads as follows:

"The Plaintiff requests the Court to rule as a matter of law that the provisions of the First Liberty Loan 3½% bond owned by the Plaintiff and offered in evidence in this case gives to the Defendant as the obligor of said bond, the privilege or option of redeeming said bond upon the giving of the notice specified therein and

33 upon the payment of the face amount of said bond in United States gold coin of the standard of value existing on June 15th,

1917, and that upon refusal or unwillingness on the part of the United States to pay on June 15th, 1935, the face amount of said bond in gold coin of the United States of the standard of value existing as of June 15th, 1917, the said bond was not then redeemable by the United States and interest coupon thereto attached dated December 15th, 1935, became due and payable by the United States on December 15th, 1935, and that since the United States has not paid the said coupon due December 15th, 1935, the Plaintiff is entitled to recover the face amount thereof in legal tender currency of the United States."

4. The Court erred in rejecting and refusing to grant the "Plaintiff's Fourth Request for Ruling of Law", which reads as follows:

"The Plaintiff requests the Court to rule as a matter of law that under the finding of facts in this case, since the Defendant was not in readiness to redeem the bond owned by the Plaintiff offered in evidence, on June 15th, 1935, by payment of the face amount thereof in gold coin of the United States of the standard of value existing on June 15th, 1917, the said bond owned by the Plaintiff was not redeemable by the United States on June 15th, 1935, and that, accordingly, the interest coupon attached to said bond dated December 15th, 1935, is now due and payable."

5. The Court erred in rejecting and refusing to grant the "Plaintiff's Fifth Request for Ruling of Law", which reads as follows:

"The Plaintiff requests the Court to rule as a matter of law that under the finding of facts in this case the Defendant was not entitled to redeem the bond owned by the Plaintiff and offered in evidence, on June 15th, 1935, unless *on* and after June 15th, 1935, the Defendant was ready and willing to pay *to* the Plaintiff upon surrender of said bond the sum of $1,000.00 in gold coin of the United States containing 25.8 grains of gold .9 fine to the dollar."

6. The Court erred in rejecting and refusing to grant the "Plaintiff's Sixth Request for Ruling of Law", which reads as follows:

34 "The Plaintiff requests the Court to rule as a matter of law that under the terms of the First Liberty Loan 3½% bond mentioned in the evidence, and the coupons thereto attached, the Defendant is bound to pay the coupons as they severally mature until the 15th day of June 1947, unless the said bond should, prior to that time, be duly called for redemption in accordance with its terms; that the condition calling the bond must, *prior to* maturity, be strictly complied with and that the call in the terms set forth in the Treasury's circular mentioned in the Stipulation is not sufficient, unless the same was made with the *bona fide* intention of paying the same at the date fixed for redemption in gold coin of the United States of the standard of value existing on June 15th, 1917, and that the Defendant having, in violation of its contract, withdrawn gold from circulation and prevented itself from complying with the condition, the Plaintiff is entitled to recover upon the coupon maturing Decem-

ber 15th, 1935, the cause of action in this case, the face amount thereof, to-wit, the sum of $17.50."

7. The Court erred in rejecting and refusing to grant the "Plaintiff's Seventh Request for Ruling of Law", which reads as follows:

"The Plaintiff requests the Court to rule as a matter of law that the Defendant having, prior to the date of the attempted call mentioned in the Stipulation, repudiated its obligation to pay the bond mentioned in the evidence, and the several coupons thereon, including the coupon sued upon in this case, in gold coin of the United States of the standard of value existing on June 15th, 1917, the Defendant at the time of said attempted call had broken its contract and was in default and, therefore, could not take advantage of the provision of the bond authorizing its redemption prior to maturity; and, therefore, judgment should be entered for the Plaintiff in the face amount of the coupon sued upon."

8. The Court erred in ruling in its opinion as follows:

"On the authority of Perry v. United States, 294 U. S. 330, and Morgan v. The United States, 113 U. S. 476, I find that the Plaintiff has no right to recover in the present suit, and that such right, if any, to recover must be in accordance with the rule laid down in the Perry case."

35 For which errors the appellant, Arthur W. Machen, respectfully prays that the said judgment of the District Court of the United States for the District of Maryland, entered on the 23rd day of June 1936 in the above entitled cause, be reversed and a judgment rendered in favor of the appellant.

H. VERNON ENEY,
ALEXANDER GORDON III,
Attorneys for Appellant.

In United States District Court

Stipulation of counsel as to making up record on appeal

Filed July 21, 1936.

It is hereby stipulated by counsel for both parties hereto:

First: That Rule 14 of the United States Circuit Court of Appeals for the Fourth Circuit shall apply and govern in the making up and printing of the Record in the above entitled case.

Second: That the following portions of the Record in the above entitled case shall be incorporated in the Transcript of the Record on appeal:

1. Docket entries.
2. Petition of Plaintiff.
3. Memorandum of Clerk as to filing of affidavit of service.
4. Answer of Defendant.
5. Findings of fact, conclusions of law, and verdict.
6. Judgment.

7. Bill of exceptions, including stipulations of facts and exhibits filed therewith. (As to the part of the bill of exceptions to be included in the printed Record, see paragraph Fourth of this stipulation.)

8. Assignment of errors of the Plaintiff.

36 9. This stipulation.

10. Memorandum of the Clerk.

11. Order transmitting Record.

12. Clerk's certificate.

Third: That the affidavit of service of a copy of the petition shall not be included in the printed Record on appeal, but in lieu thereof the Clerk shall insert in the Record a memorandum of the filing of said affidavit of service.

Fourth: That the exhibits attached to the stipulation of facts referred to in Item 7 of Paragraph Second of this stipulation shall be included in the printed Record, except that Exhibit C and all of Exhibit E except the first three pages thereof, shall not be included in the printed Record, but neither party shall be precluded from reference to or use of such omitted parts.

H. VERNON ENEY,
ALEXANDER GORDON III,
Attorneys for Plaintiff.
BERNARD J. FLYNN,
United States Attorney.
C. ROSS MCKENRICK,
Asst. U. S. Attorney.

In United States District Court

Memorandum of the clerk

1. Petition for appeal filed 6th July 1936.
2. Appeal granted 6th July 1936.
3. Appeal Bond, 6th July 1936. Penalty, $300.00. Obligors: Arthur W. Machen, as Principal, and Alexander Armstrong and H. Vernon Eney, as Surety. Conditioned for costs.
4. Citation dated 9th June 1936. (Service acknowledged.)

37 In United States District Court

Order to transmit record

And, thereupon, it is Ordered by the Court here that a transcript of the Record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

Teste:

ARTHUR L. SPAMER, *Clerk.*

[Clerk's certificate to foregoing transcript omitted in printing.]

39 In United States Circuit Court of Appeals for the Fourth Circuit

No. 4108

ARTHUR W. MACHEN, APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the District of Maryland, at Baltimore

Docket entries

September 3, 1936, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond, and citation are certified up under section 7 of Rule 14.

Same day, petition and order extending the time for a period of thirty days after August 15, 1936, for preparing, printing, and filing the record and docketing the cause are filed.

Same day, the appearance of Alexander Gordon, III, is entered for the appellant.

Same day, twenty-four copies of the printed record are filed.

40 September 5, 1936, the appearance of Bernard J. Flynn, United States Attorney; C. Ross McKenrick, Assistant U. S. Attorney; Harry LeRoy Jones and Edward First, Attorneys, Department of Justice, is entered for the appellee.

September 10, 1936, the appearance of H. Vernon Eney is entered for the appellant.

October 28, 1936, motion of appellee to re-set cause for argument is filed and the cause is assigned for argument on November 16, 1936.

ARGUMENT OF CAUSE

November 16, 1936 (November term, 1936), cause came on to be heard before Parker and Soper, Circuit Judges, and Watkins, District Judge, and is argued by counsel and submitted.

41 In United States Circuit Court of Appeals for the Fourth Circuit

No. 4108

ARTHUR W. MACHEN, APPELLANT

versus

THE UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the District Maryland, at Baltimore

Argued November 16, 1936. Decided January 15, 1937

Before PARKER and SOPER, Circuit Judges, and WATKINS, District Judge

H. Vernon Eney (Alexander Gordon, III, on brief) for Appellant, and Harry LeRoy Jones, Attorney, Department of Justice,

(James W. Morris, Assistant Attorney General; Bernard J. Flynn, U. S. Attorney; C. Ross McKenrick, Assistant U. S. Attorney; Edward First, Attorney, Department of Justice; Clarence V. Opper, Assistant General Counsel, Treasury Department, and Bernard Bernstein, Attorney, Treasury Department, on brief), for Appellee.

Opinion

Filed January 15, 1937

42 PARKER, Circuit Judge: This is a suit by the holder of a $1,000.00 3½% First Liberty Loan Bond to recover of the United States the amount of the interest coupon for $17.50 due December 15, 1935. The government's defense is that the bond was called for payment on June 15, 1935, and that by express provision of the bond itself interest ceased after that date and the coupons thereafter maturing became void. Plaintiff contends in reply to this that the call for payment and notice issued thereon were invalid to stop the running of interest because, under the acts of Congress in effect at that time, the bond could not be paid in gold according to the promise therein contained and because the currency in which payment was tendered was based upon the "devalued" dollar instead of upon the standard of value in effect at the time the bonds were issued. The facts were stipulated, and from judgment thereon for the government the plaintiff has appealed. The pertinent provisions of the bond are as follows:

"The United States of America for value received promises to pay to the bearer the sum of one thousand dollars on the 15th day of June 1947 with interest at the rate of three and one-half per centum per annum, payable semi-annually on December 15 and June 15 in each year until the principal hereof shall be payable, upon presentation and surrender of the interest coupons hereto attached as they severally mature. *The principal and interest of this bond shall be payable in United States Gold coin of the present standard of value*, and shall be exempt, both as to principal and interest, from all taxation, except estate or inheritance taxes, imposed by authority of the United States, or its possession, or by any State or local taxing authorities. * * * All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, on any semi-annual interest payment date or dates, *at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date* and published
43 thereafter from time to time during said three months' period, as the Secretary of the Treasury shall direct. If in any case less than all of the bonds of said series are to be redeemed, the bonds to be redeemed will be determined by lot by such method as may be prescribed by the Secretary of the Treasury. From the date of *redemption* designated in any *such notice*, interest on the bonds called

for redemption shall cease, and all coupons thereon maturing after said date shall be void." [Italics ours.]

The notice calling the bond for payment was in the usual form; and there is no question but that it would have had the effect of stopping the running of interest and avoiding the coupons maturing after June 15, 1935, except for the legislation of Congress affecting the currency, which limited the power of the Secretary of the Treasury and must be read into the notice. At the time of the issuance of the bond the gold dollar was the standard of value in our monetary system and was defined by law as consisting of twenty-five and eight-tenths grains of gold nine-tenths fine. Act of Mar. 14, 1900, c. 41, sec. 1, 31 Stat. 45, 31 U. S. C. A. 314. And the statutes provided for the use of gold coin as a medium of exchange. R. S. 3511. By Presidential Proclamation of January 31, 1934, issued under the act of May 12, 1933 (38 Stat. 52, 53), as amended by the act of January 30, 1934 (48 Stat. 342), the *content of the dollar* was reduced to 15-5/21 grains of gold nine-tenths fine; and, at the time of the publication of the notice calling the bond for payment, gold coin had been withdrawn from circulation, its possession had been prohibited under penalty, and payment in gold coin by the United States had been prohibited. 48 Stat. 337, 340. By joint resolution of June 5, 1933 (48 Stat. 112, 113), the payment of gold clause bonds in any legal tender currency "dollar for dollar" had been authorized; and it was paper currency based on the 15-5/21 grain dollar, and nothing
44 else, that was offered in payment of gold clause bonds which were called for payment by the Treasury. The notice of redemption calling the bond in question for payment was equivalent, therefore, to a notice that the United States elected to redeem the bond in paper currency based on a 15-5/21 grain dollar, notwithstanding that it was payable in gold coin based on a 25-8/10 grain dollar and might be redeemed only at its face value.

In Perry v. United States, 294 U. S. 330, the Supreme Court held the joint resolution of June 5, 1933, invalid in so far as it affected gold clause bonds of the government because it was in conflict with Art. 1, Sec. 8, Clause 2, of the Constitution, authorizing Congress to borrow money on the credit of the United States, and with Sec. 4 of the 14th Amendment to the Constitution, providing that the validity of the public debt of the United States shall not be questioned. The court quoted with approval from the Sinking Fund Cases: "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." And to this the court added:

"The Congress as the instrumentality of sovereignty is endowed with certain powers to be exerted on behalf of the people in the manner and with the effect the Constitution ordains. The Congress cannot invoke the sovereign power of the people to override their will as thus declared. The powers conferred upon the Congress are

harmonious. The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the Government—upon which in an extremity its very life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations. The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding
45 character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists, and, despite infirmities of procedure, remains binding upon the conscience of the sovereign."

In the Perry case it was held that the holder of a gold clause U. S. Government bond who had demanded payment in gold upon the calling of his bond was not entitled to recover damages for breach of the government's contract to pay in gold, because as gold had been withdrawn from circulation as a monetary medium of exchange there was no standard by which such damage might be measured. In the pending case, however, the plaintiff is not seeking payment of the interest in gold nor suing for damages by reason of the failure of the government to pay the interest in gold. On the contrary, the plaintiff is willing to accept the interest in legal tender currency, dollar for dollar, and the suit is based on the theory that the government can hasten the maturity of the bonds and thereby stop the running of interest and avoid the subsequently maturing coupons, only by complying with the terms of the contract contained in the bonds themselves, which authorize redemption at face value upon the giving of three months' notice. It is argued by the government that as the court in the Perry case did not deny the right of the holder of the bonds to sue the United States, the implication is that the call was valid, for otherwise the bondholder would have had no right to sue for the principal of the debt; but the question of the validity of the call was not raised in that case and was not considered by the court.

The decision in Morgan v. United States 113 U. S. 476, relied upon, with the Perry case, by the learned judge below, is not an authority against the position of plaintiff. That case merely holds that when notice of redemption of government bonds is given in accordance with their terms, they become payable on demand without
46 interest after the maturity of the call. The question here is whether there was such an exercise of the right of redemption by the call as to stop the running of interest and avoid the interest coupons.

The argument of the government and the decision of the Court of Claims in Dixie Terminal Co. v. United States —, Ct. Cl. —, to which our attention is called, proceed upon the theory that the provision of the bond providing for notice, upon which interest is to

cease and coupons subsequently maturing are to become void, is to be construed as though it were independent of the provision for redemption which it follows, i. e., that a notice is sufficient which states that the bonds will be redeemed on the named date, even though it does not say or mean to say that they will be redeemed in accordance with their terms. We think that the position is unsound and that, under the decision in the Morgan case, supra, the provision as to notice must be construed as a part of the provision for redemption. The bonds were not finally payable until June 15, 1947. The government was given an option to redeem on or after June 15, 1932, but this option was to redeem them "at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date." Interest was to cease and subsequently maturing coupons were to be void "from the date of redemption designated in any such notice", i. e., from the date of redemption designated in a notice calling the bonds for redemption "at the face value thereof and interest accrued prior to the redemption date." It is manifest that when the bonds were payable in gold coin of the standard of value at the time of issue, i. e., 25–$^{8}/_{10}$ grains of gold to the dollar, a proposal to redeem them in paper money based upon 15–$^{5}/_{21}$ grains of gold to the dollar was not a proposal to redeem them at face value; and a notice that the government would redeem them on such basis, which is what the notice in question means when considered as it must be in connection with the legislation binding upon the Secretary of the Treasury, was not such a notice as the bonds prescribed for the exercise of the option retained by the government. It would hardly be contended that a notice to the effect that the government would redeem the bonds at 59 cents on the dollar would be a sufficient notice under the bond to stop the running of interest and avoid the subsequently maturing coupons; but it will be seen that this is precisely what the notice as published means when the acts of Congress and the presidential proclamation affecting the currency are read into it, and when it is remembered that Congress is without power to abrogate the gold clause as contained in obligations of the government.

47

It is suggested that the legislation and proclamation affecting the currency, to which we have referred, should be held invalid so far as government obligations are concerned, and that when this is done the notice should be construed as offering to pay the face value of the bonds. The answer to this is that whatever the validity of the legislation and the proclamation in question, so far as impairing the obligations of the government is concerned, they are unquestionably valid as limitations upon the power of the Secretary of the Treasury. He is forbidden by them to pay gold out of the treasury, and he is allowed to pay obligations in currency only "dollar for dollar", notwithstanding such obligations may contain a gold clause. It seems clear that, even though Congress may not under the Constitution question the obligations of the government, it may control the dis-

position of the gold in the treasury and may direct how the resources of the government may be used in the discharge of its obligations. Cf. Perry v. U. S., 294 U. S. 330, at 356. It follows that, because of the legislation and the presidential proclamation to which we have referred, the Secretary of the Treasury was without power, both at the time of the publication of the notice and at the time fixed
48 for redemption, either to pay gold on the gold clause bonds or to pay in paper money the value of the gold which they promised. He was consequently without power under the law to redeem these gold clause bonds at their face value; and the notice of redemption which he issued must be construed in the light of this lack of power.

It is suggested that the notice must be read without reference to the legislation and the presidential proclamation affecting the currency, on the ground that the notice was given by the government in its private capacity as a borrower, whereas the legislation and proclamation issued pursuant thereto were the exercise of governmental powers. We see no basis for such a position. It is elementary that laws which subsist at the time and place of the making of a contract enter into and form a part of it as fully as if they had been incorporated in its terms. F. & M. Bank v. Federal Reserve Bank, 262 U. S. 649; Worthem Co. v. Kavanaugh, 295 U. S. 56, 60. A fortiori, laws affecting and limiting the means of payment must be read into a governmental notice promising payment. When the Secretary of the Treasury has been forbidden by law to pay gold out of the treasury and has been required to discharge bonds tendered for redemption with currency based on a 15-$^{5}/_{21}$ grain dollar, it is idle to contend that a notice to redeem means that he stands ready to redeem in accordance with the promise of the bond, i. e., in gold coin based upon a 25-$^{8}/_{10}$ grain dollar.

It is argued that if gold coin had been paid plaintiff in accordance with the terms of the bond he would have been required to surrender same to the government at once and accept legal tender currency in lieu thereof, and that, therefore, the tender of currency based on the devalued dollar was substantial compliance with the condition of redemption; but if the government could nullify its promise as contained in the gold clause in this way, the gold clause would mean nothing. In the Perry case the majority of the Court were
49 of opinion that the government, although immune from liability in the action, was bound by its obligation contained in the gold clause, notwithstanding the exercise by it of the constitutional power to regulate the currency. This is made very clear by considering the opinion of the concurring Justice in connection with the opinion of the Court. Since this is so, the contract as contained in the gold clause remained in effect notwithstanding the legislation to which we have referred and the proclamation issued thereunder; and the running of interest on the bond sued on could not be stopped or the interest coupons avoided except by compliance with the provi-

sion for redemption, which, as we have seen, has not been complied with. Since the plaintiff is willing to accept payment of interest in the present currency, the question does not arise as to whether he is entitled to have same paid in gold.

No amount of argument can obscure the real situation. It is this: the government has promised to pay the bonds in question in gold coin of the standard of value prevailing in 1917. By their terms, it is permitted to redeem them only by paying them at their face value. It is proposing to redeem them, not by paying them at that face value but in paper money worth only about 59% thereof. The notice which it has issued means this and nothing else. Such a notice is not in accordance with the condition of redemption specified in the bond and consequently does not stop the running of interest or avoid the coupons.

For the reasons stated, we think that there was error in entering judgment for the government upon the facts as stipulated.

Reversed.

51 In United States Circuit Court of Appeals, Fourth Circuit

No. 4108

ARTHUR W. MACHEN, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the District of Maryland

Judgment

Filed and Entered January 15, 1937

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the District of Maryland, at Baltimore, with directions to set aside the verdict and grant a new trial in accordance with
52 the opinion of the Court filed herein.

JOHN J. PARKER,
Senior Circuit Judge.

JANUARY 15, 1937.

53 [Petition for rehearing and brief in support thereof, covering 20 pages, omitted from this print. It was denied, and nothing more by order of April 6, 1937.]

73 In United States Circuit Court of Appeals

Order staying mandate pending petition for rehearing

Filed February 15, 1937

Upon the application of the Appellee, by its attorneys, and it appearing to the Court that the Appellee has presented a petition for a rehearing in this cause,

It is ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the action of the Court upon the said petition of the Appellee for a rehearing.

JOHN J. PARKER,
Senior Circuit Judge.

FEBRUARY 15, 1937.

In United States Circuit Court of Appeals, Fourth Circuit

[Title omitted.]

Order denying rehearing

Filed and Entered April 6, 1937

74 This Court having at its January term, 1937, rendered its decision reversing the judgment of the said District Court, appealed from in this cause, and the appellee having on February 13, 1937, presented to the Court a petition for a rehearing of the said cause, and the same having been carefully considered,

It is now here ordered by this Court that the rehearing asked for be, and the same is hereby, denied. Let mandate issue after the expiration of five days from this date.

JOHN J. PARKER,
Senior Circuit Judge.

APRIL 6th, 1937.

April 9, 1937, petition of appellee for a stay of the mandate is filed.

In United States Circuit Court of Appeals

Order staying mandate pending application for writ of certiorari

Filed April 9, 1937

Upon the application of the appellee, by its attorneys, Sam E. Whitaker, Assistant Attorney General, and Harry LeRoy Jones, Attorney, Department of Justice, and for good cause shown,

75 It is ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the application of the said appellee in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered

by this or the said Supreme Court, and provided said application is filed in the said Supreme Court within 30 days from this date.

JOHN J. PARKER,
Senior Circuit Judge.

APRIL 9th, 1937.

76 May 7, 1937, petition of appellee for a further stay of the mandate is filed.

In United States Circuit Court of Appeals

Order further staying mandate

Filed May 10, 1937

Upon the application of the appellee, by its attorneys, Sam E. Whitaker, Assistant Attorney General, and Harry LeRoy Jones, Attorney, Department of Justice, and for good cause shown,

It is ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, further stayed pending the application of the said appellee in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the said Supreme Court within 30 days from this date.

JOHN J. PARKER,
Senior Circuit Judge.

MAY 10th, 1937.

77 [Clerk's certificate to foregoing transcript omitted in printing.]

78 Supreme Court of the United States

Order allowing certiorari

Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, and the case is assigned for hearing immediately following No. 43.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

(Endorsement on cover:) File No. 41679. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 198. The United States of America, petitioner, *vs.* Arthur W. Machen. Petition for a writ of certiorari and exhibit thereto. Filed July 6, 1937. Term No. 198 O. T. 1937.

U.S. GOVERNMENT PRINTING OFFICE: 1937

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —

THE UNITED STATES OF AMERICA, PETITIONER

v.

ARTHUR W. MACHEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit in the above case.

OPINIONS BELOW

The memorandum opinion of the District Court of the United States for the District of Maryland (R. 14) is not reported. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 40) is reported in 87 F. (2d) 594. The petition of the United States for a rehearing was denied without written opinion (R. 56).

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered January 15, 1937 (R. 45). The petition of the United States for rehearing was denied April 6, 1937 (R. 56). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether respondent, as owner of a First Liberty Loan 3½% bond of 1932–1947, is entitled to recover the amount of an interest payment for the period June 15, 1935, to December 15, 1935, the bond having been the subject of a notice of call for redemption on June 15, 1935.

STATUTES INVOLVED

This case may be said to involve the monetary legislation of Congress in 1933 and 1934, particularly that legislation which is concerned with the regulation of the value of all coins and currency, with "gold clause" obligations and with the restrictions upon the use of gold coin.

Act of March 9, 1933, c. 1, 48 Stat. 1;
Act of May 12, 1933, c. 25, 48 Stat. 51–53;
Public Resolution No. 10, approved June 5, 1933, c. 48, 48 Stat. 112;
Gold Reserve Act of 1934, approved January 30, 1934, c. 6, 48 Stat. 337.

STATEMENT

The respondent, a resident and citizen of the United States, is the owner of a $1,000 First Lib-

erty Loan 3½% bond of 1932–1947, which he acquired on March 22, 1933 (R. 27, 28). This bond in part provides (R. 18, 19):

> The United States of America for value received promises to pay to the bearer the sum of one thousand dollars on the 15th day of June, 1947, with interest at the rate of three and one-half per centum per annum payable semi-annually on December 15 and June 15 in each year until the principal hereof shall be payable, upon presentation and surrender of the interest coupons hereto attached as they severally mature. * * *
> All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, on any semi-annual interest payment date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date and published thereafter from time to time during said three months' period as the Secretary of the Treasury shall direct. * * *
> From the date of redemption designated in any such notice, interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void.

The respondent at no time has held a license to acquire, hold, or in any manner deal with United States gold coin (R. 16).

On March 14, 1935, and from time to time thereafter, the Secretary of the Treasury duly published a notice of call for redemption of First Liberty Loan bonds (R. 16). This notice stated *inter alia* that "All outstanding First Liberty Loan bonds of 1932–47 are hereby called for redemption on June 15, 1935" (R. 20).

The respondent did not surrender or offer to surrender or present for payment his bond, but it has been stipulated that upon proper presentation and surrender of all First Liberty Loan 3½% bonds the United States redeemed them by the payment of legal tender currency equal to the face amount of the bonds and that the Treasury Department refused to pay gold coin therefor (R. 16, 17).

The respondent instituted suit on December 30, 1935, in the United States District Court for the District of Maryland to recover $17.50 upon an interest coupon covering the period from June 15, 1935, to December 15, 1935 (R. 3–10). This coupon was not surrendered or presented for payment but it has been stipulated that the payment of similar interest coupons has been refused by the Treasury Department (R. 17).

On June 23, 1936, the District Court entered judgment in favor of the petitioner herein (R. 14). Upon appeal to the Circuit Court of Appeals for the Fourth Circuit, this judgment was reversed on January 15, 1937 (R. 45–46). A petition for rehearing was denied April 6, 1937 (R. 56).

SPECIFICATION OF ERRORS TO BE URGED

The United States urges that the Circuit Court of Appeals for the Fourth Circuit erred:

1. In failing to hold that the principal of the bond became payable on June 15, 1935, the date designated in the notice of call for redemption, and that the Government's obligation to pay interest then ceased.

2. In holding that the notice of call for redemption was not sufficient to stop the running of interest on the bond after June 15, 1935, the date designated in the notice of call for redemption.

3. In holding that respondent, who at no time has held a license to acquire, hold, or deal with United States gold coin, was entitled to recover interest after the date designated in the notice of call for redemption.

4. In holding the United States liable on an interest coupon which had not been presented and surrendered for payment.

5. In reversing the judgment of the District Court and holding that the plaintiff was entitled to recover.

REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals for the Fourth Circuit herein is in conflict with the decisions of the Court of Claims in *Dixie Terminal Company* v. *United States,* 83 C. Cls. 656, and *James D. Smyth* v. *The United States,* decided May 3, 1937, not yet reported.

The decision below was rendered after the decision of the Court of Claims in the *Dixie Terminal* case and prior to the decision of that court in the *Smyth* case. The court below characterized the decision in the former case as "unsound", while the Court of Claims in the *Smyth* case stated that it was "not persuaded" by the opinion in the instant case.

Petitions for certiorari were granted by this Court in the *Dixie Terminal* and *Smyth* cases on June 1, 1937, and those cases are pending as Nos. 43 and 42, 1937 Term. Because of the conflict with the instant decision, and the importance of the question presented, the Government did not oppose the applications for certiorari in those cases.

In view of the foregoing, it is respectfully submitted that this petition for a writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

JULY 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937

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No. 198.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

ARTHUR W. MACHEN.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MEMORANDUM FOR THE RESPONDENT.

H. VERNON ENEY,
Attorney for the Respondent.

In The

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THE UNITED STATES OF AMERICA,
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ARTHUR W. MACHEN.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MEMORANDUM FOR THE RESPONDENT.

The Respondent joins with the Petitioner in its request that a writ of certiorari herein be granted. While the Respondent respectfully submits that the decision of the court below is correct, the Respondent agrees that the case should be reviewed by this Court because of the importance of the question presented and the conflict between the decision below and the decisions of the United States Court of Claims in Dixie Terminal Company vs. United States, 83 Ct. Cls. 656, and Smyth vs. United States, not yet reported, decided May 3, 1937, in which cases petitions for certiorari were granted by

this Court on June 1, 1937, the same being now pending as Nos. 42 and 43 on the Docket of this Court for the October Term, 1937.

The Respondent respectfully prays that in the event the petition for certiorari in this case be granted, the case be advanced on the Docket to follow immediately after Nos. 42 and 43 for the reason that said Nos. 42 and 43 involve substantially the same question as this case.

H. VERNON ENEY,

Attorney for the Respondent.

July 31, 1937.

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BRIEF FOR RESPONDENT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 198.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

ARTHUR W. MACHEN,
Respondent.

H. VERNON ENEY,
ALEXANDER GORDON, III,
Attorneys for Respondent.

The Daily Record Co. Print, Baltimore.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 198.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

ARTHUR W. MACHEN,
Respondent.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

This case comes up on a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit. The respondent sued in the District Court of the United States for the District of Maryland to recover the sum of $17.50, being the face amount of an interest coupon due December 15, 1925, formerly attached to a $1000. First Liberty Loan 3½% coupon bond of the United States issued on June 15, 1917, and maturing on June 15, 1947. The jurisdiction of the District Court was invoked under the provisions of U.S.C., Tit. 28, §41(20) which gives to the District Courts of the United States jurisdiction

"of all claims not exceeding $10,000.00 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity or admiralty, if the United States were suable". The suit was instituted on December 30, 1935, and hence would not be barred by the Act of August 27, 1935 (c. 780 §2, U.S.C., Tit. 31, §773b) even if that Act were applicable to a suit of this nature.

The government contended that the bond to which the coupon in question had been attached had been called for redemption on June 15, 1935 and that all subsequent coupons were therefore void. The respondent, on the other hand, contended that since, at the time of the issuance of the notice of call for redemption, the government had no intention of redeeming the bond in gold coin and had, on the day of redemption, refused to redeem by payment in gold coin, the bond had not been validly called for redemption or redeemed and that accordingly the bond, and all coupons attached thereto, were still subsisting obligations of the United States.

The District Court entered a judgment in favor of the government (R. 9). On appeal to the Circuit Court of Appeals for the Fourth Circuit the judgment was reversed and the cause remanded (R. 32). A writ of certiorari was granted by this Court on October 11, 1937 (R. 34). The opinion of the Circuit Court of Appeals appears at pages 27-32 of the record and is reported in 87 Fed. (2d) 594.

THE QUESTION PRESENTED.

Since it is conceded by both parties that if the respondent's bond was validly called for redemption and redeemed as contended by the government, the respondent is not entitled to recover, and that otherwise he is entitled to recover, it will be seen that the only question presented is:

> Did the United States have the right to redeem the respondent's bond on June 15, 1935, by giving a notice of intention to redeem on that date when at the time of the issuance of the notice and at the date fixed for redemption the United States was not ready, able and willing to pay the principal of the bond in gold coin of the standard of value existing on June 15, 1917?

The respondent contends that the United States could not redeem his bond except by tendering payment therefor in gold coin after having given a notice of redemption with the bona fide intention to pay the bond in gold coin at the time fixed for redemption.

STATEMENT OF FACTS.

All of the facts of this case are set forth in two stipulations of facts (R. 10-18, 19). There was some testimony taken (R. 18-19) but at the request of the Court it was embodied in a supplemental stipulation. The District Court found the facts to be as set forth in the two stipulations (R. 9). A statement of the facts in narrative form may nevertheless prove helpful.

On June 15, 1917, the United States issued $2,000,000,000.00 of an authorized issue of $5,000,000,000.00 of gold bonds pursuant to the Act of Congress approved April

24, 1917 (ch. 4, § 1, 40 Stat. 35). A copy of one of the bonds so issued, which is identical in form and content with the respondent's bond, is attached to the Stipulation of Facts (R. 12-13). Pursuant to the terms of the Act of April 24th, 1917, and pursuant to U.S.C., Tit. 31, § 768, the bonds so issued provided for payment of both principal and interest in gold coin, in the following language:

> "The principal and interest of this bond shall be payable in United States gold coin of the present standard of value * * *" (R. 12).

At the time of the issuance of this bond, the Act of March 14, 1900 (31 Stat. 45, U.S.C., Tit. 31, § 314), was in force and under and pursuant to that statute a dollar in gold consisted of twenty-five and eight-tenths grains of gold, nine-tenths fine.

On March 22, 1933, the respondent, in reliance upon the good faith and credit of the United States, purchased and has ever since held and owned, and now holds and owns, one of the bonds issued by the United States as above set forth, in the denomination of $1000.00, being No. 47084 (R. 19).

On March 6, 1933, the President had declared "a bank holiday" until March 9, 1933, and thereafter a number of statutes, executive orders and orders of the Secretary of the Treasury affecting the currency were passed and issued. These regulations are referred to at length in the opinion of Mr. Chief Justice Hughes in *Norman v. B. & O. Railroad Co.*, 294 U. S. 240, 295-7, but it is here necessary to refer only to a few of the more important.

On April 5, 1933, the President by executive order (No. 6102, 12 U.S.C.A., § 248, note) required all persons to deliver all gold coin, gold bullion and gold certificates

to certain banks and accept "an equivalent amount" of other forms of currency therefor.

On May 12, 1933, the Agricultural Adjustment Act was passed and by section 43 of that Act (48 Stat. 51, U.S.C., Tit. 31, § 821) the President was authorized, under certain circumstances, to "fix the weight of the gold dollar" in such manner as not to "reduce its present weight by more than 50 per centum". However, the gold content of the dollar was not then reduced.

On June 5, 1933, a joint resolution of Congress (48 Stat. 112, U.S.C., Tit. 31, §§ 462, 463) was passed and approved, §463 providing as follows:

> "(a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.
>
> "(b) As used in this section the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term

'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations."

On January 30, 1934, the "Gold Reserve Act of 1934" (48 Stat. 337) was passed. Section 3 of this Act (48 Stat. 340, U.S.C., Tit. 31, §442) authorized the Secretary of the Treasury by regulations to prescribe the conditions under which gold might be acquired and held, etc., and section 4 (48 Stat. 340, U.S.C., Tit. 31, §443) provided that gold withheld, acquired, etc., in violation of such regulations should be forfeited to the United States and that the person violating such regulations should be subject to a penalty of twice the value of the gold. Section 5 (48 Stat. 340, U.S.C., Tit. 31, § 315b) provided that all gold coin should be withdrawn from circulation and formed into bars and that "no gold shall hereafter be coined, and no gold coin shall hereafter be paid out or delivered by the United States". Section 6 (48 Stat. 340, U.S.C., Tit. 31, §408a) provided that except to the extent permitted in the regulations of the Secretary of the Treasury, no currency of the United States should be redeemed in gold. By sections 8 and 9 (48 Stat. 341, U.S.C., Tit. 31, §§ 734, 733) the Secretary of the Treasury, with the approval of the President, was authorized to purchase or sell gold "at such rates and upon such terms and conditions as he may deem most advantageous to the public interest". By section 12 (48 Stat. 342, U.S.C., Tit. 31, §821), section 43 of the Agricultural Adjustment Act was amended to provide that the weight of the gold dollar should not "be fixed in any event at more than 60 per centum of its present weight".

On January 31, 1934, the President, by proclamation (31 U.S.C.A., § 821, note) fixed "the weight of the gold dollar to be 15-5/21 grains nine-tenths fine" or approximately 59% of its previous weight.

On February 18, 1935, this Court in *Perry v. United States,* 294 U. S. 330, held the Joint Resolution of June 5, 1933, invalid in so far as it attempted to override the obligation created by gold bonds issued by the United States.

On March 14, 1935, the Secretary of the Treasury issued a "Notice of Call for Redemption before Maturity" of all outstanding First Liberty Loan bonds of 1932-47 (R. 13-14). The notice stated, "All outstanding First Liberty Loan bonds of 1932-47 are hereby called for redemption on June 15, 1935" (R. 13).

This included the bond owned by the respondent which bond, as well as all other bonds of the same issue, provided as follows:

> "All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, on any semi-annual interest payment date or dates, at the face value thereof and interest accrued to the date of redemption, on notice published at least three months prior to the redemption date and published thereafter from time to time during said three months period as the Secretary of the Treasury shall direct. If in any case less than all of the bonds of said series are to be redeemed, the bonds to be redeemed will be determined by lot by such method as may be prescribed by the Secretary of the Treasury. From the date of redemption designated in any such notice, interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void" (R. 12).

At the time of the issuance of this "Notice of Call for Redemption" on March 14, 1935, the fiscal agents of the United States were not authorized to make payment of such bonds as might be tendered for redemption in accordance with the notice, in gold, but were authorized and directed to make payment thereof only in currency of the United States other than gold (R. 11). Neither at the time of the issuance of the notice nor at the date fixed for redemption were the United States ready, able or willing to redeem the bonds in gold as they had contracted to do. At that time the Gold Reserve Act of 1934 was in force and Section 5 thereof (U.S.C., Tit. 31, § 315b) provided that no gold should be coined and no gold should be paid out or delivered by the United States. On and after June 15, 1935, the United States paid all First Liberty Loan 3½% bonds tendered for redemption pursuant to the notice in currency of the United States *other than gold, but the* Treasury Department refused to pay for the *same* in gold (R. 11). Because of these facts, the respondent did not surrender or present for payment the bond owned by him. Had he done so, the United States would not have paid the same in any manner except by payment of $1000.00 in devalued currency of the United States other than gold (R. 11).

No interest coupons dated December 15, 1935, on the First Liberty Loan 3½% bonds have been paid by the United States (R. 11). Such coupons as were presented for payment were refused payment by the Treasury Department *on the ground* that the bonds to which the same had been attached had been called for redemption (R. 11). The respondent did not present for payment the coupon dated December 15, 1935, attached to the First Liberty Loan 3½% bond owned by him, being the coupon here

in suit, because such presentment would have been a wholly futile act since the United States had already publicly announced their intention not to pay the same (R. 14-16). If the coupon had been presented for payment, payment would have been refused (R. 11).

Accordingly, on December 30, 1935 (R. 1), the respondent filed suit to recover judgment against the United States for the sum of $17.50 (R. 1-6), being the face amount of the interest coupon due December 15, 1935, which the United States refuse to pay. The judgment of the District Court being in favor of the United States (R. 9), the respondent appealed (R. 25) to the Circuit Court of Appeals for the Fourth Circuit. That Court reversed the judgment and the Government brought the case to this Court on certiorari.

THE NATURE OF THE RESPONDENT'S CASE.

The government's brief throughout shows a complete misconception of the nature of the respondent's suit, and throughout its brief the government treats the case as though the situation presented were precisely the same as that presented in the case of *Perry v. United States*, 294 U. S. 330. Because of this fact, we think it essential to first place clearly before the Court the nature of the respondent's case.

The respondent is not seeking in this case to compel the United States to pay his bond or the interest coupon thereto attached in gold or in currency in an amount in excess of the face amount of the bond, or the interest coupon. Indeed, the respondent is not seeking payment of his bond at all. This suit has not been brought to recover the face amount of the bond either in gold or in currency, nor is it brought to recover any sum in excess of

the face amount of the bond. The respondent is perfectly content to hold his bond until its maturity on June 15, 1947, upon payment in the meantime of the interest as it accrues thereon. The United States have paid all interest coupons up to and including the coupon due on June 15, 1935, but they refuse to pay the coupon due on December 15, 1935. It is on that coupon that this suit was brought. The respondent concedes that under the decision in *Perry v. United States,* 294 U. S. 330, he cannot compel payment of the coupon in gold coin, but he does most emphatically contend that he is entitled to payment of the coupon in legal tender currency other than gold.

The contract contained in the coupon is simple and clear. The United States unequivocally promise to "pay to bearer $17.50 for six months interest due on the fifteenth day of Dec. 1935 on $1000. 3½ per cent Bond of Liberty Loan of 1917" (R. 13). The interest coupon is payable in gold coin just as is the principal of the bond, but the respondent is not asking for payment of the interest coupon in gold. He is content to receive $17.50 in legal tender currency. Since the respondent asks for that and nothing more, there could be no question about the matter were it not for the fact that the government contends that the bond to which the coupon was attached was called for redemption and that consequently the coupon is void. In other words, the government in effect pleads confession and avoidance. It sets up an affirmative defense and avers that although it did promise to pay the respondent $17.50 on Dec. 15, 1935, that promise has become void by the happening of a condition subsequent. This the respondent denies, and the only question presented in this case is whether or not the respondent's bond has been validly called for redemption.

Now, the bond does contain a provision authorizing the United States to redeem the bond before maturity and in the event of redemption the obligation to pay interest undoubtedly ceases and the subsequent coupons become void. However, the government and the respondent do not agree as to what is meant by redemption in this case; they do not agree as to just what the condition subsequent is upon the happening of which the subsequent interest coupons become void. The government contends that the only condition which must be complied with is that the United States give to the respondent a three months notice of an intention to redeem. But the bond is payable in gold coin both at maturity and upon prior redemption and such payment in gold coin is a condition which must be complied with in order for the government to avail itself of its option to redeem. It cannot refuse to perform that condition and at the same time demand performance from the one in whose favor the condition runs.

We admit the right of the government to redeem its bond, but we most respectfully urge that it cannot redeem its bond except by the payment of the principal thereof in gold coin. This does not mean that we demand payment in gold. It simply means that the government, so long as it persists in its refusal to pay in gold coin, cannot redeem before maturity. In other words, the respondent contends that the government can redeem his bond only in accordance with its terms, that is to say, upon payment of the principal "in United States gold coin of the * * * standard of value" existing at the time of the issuance of the bond. We do not question the constitutional power of Congress to regulate the currency of the United States, nor do we question the power of Congress over gold as a part of the currency of the United

States. Congress could withdraw gold from circulation and make it impossible for the respondent to receive gold for his bond, but by so doing it placed the government in a position where it could not comply with the condition of the bond and hence could not redeem its bond prior to maturity. The fact that the government in the exercise of its constitutional power withdrew gold from circulation does not excuse it from compliance with the condition precedent to the exercise of its privilege of redeeming its bond prior to maturity.

In making this contention, we are not saying, as the government in its brief implies, that the power of Congress over gold is restricted and that we must be paid in gold coin or be paid some amount in excess of the face amount of the bond, in legal tender currency. We are not asking for payment of the bond in gold, or in legal tender currency, either at its face value or in any amount in excess of its face value. We are not questioning the power of Congress to refuse to pay the respondent gold; we merely question the power of the United States to redeem its obligation except by payment in gold. This does not deprive the government of its power of redemption—that always remains just as it was. It might be onerous for the government to comply with the condition of the bond by paying in gold coin and hence it might not be practicable to exercise the right of redemption under such conditions, but the right is still there.

We admit the government's right to redeem its bond. We say that that right is subject to two conditions, that a valid notice of redemption be given and that redemption be actually made. The government contends that only one condition exists, that is, that a notice of redemption, but not necessarily a notice of redemption in gold, be

given. They deny absolutely that the right of redemption is conditioned upon actual redemption by payment.

Thus it will be seen that the question presented is simply one of construction of the contract between the parties.

ARGUMENT.

I.

PRELIMINARY CONSIDERATIONS.

Although the question presented in this case is solely one of construction of the contract between the parties and the exact question here has never before been presented to this Court for determination, the government nevertheless insists that the whole question presented by this case has already been decided by this Court in *Perry v. United States, supra.* It seems clear to us that such is not the case but we think it would be well to first discuss the decision in that case and the related cases decided at the same time before discussing the specific contract before the Court in this case and its legal effect.

A.

The Gold Clause Cases of 1935.

The so-called "Gold Clause Cases" were three in number: *Norman v. B. & O. Railroad,* 294 U. S. 240; *Nortz v. United States,* 294 U. S. 317; and *Perry v. United States,* 294 U. S. 330. There was a strong dissenting opinion filed by four of the nine Justices covering each of the three cases. The *Norman* case came up on *certiorari* to the Court of Appeals of New York and the *Nortz* case and *Perry* case came up on questions certified by the United States Court of Claims.

The first case, *Norman v. B. & O. Railroad, supra,* presented the question of "the validity of the joint resolution of the Congress, of June 5, 1933, with respect to the 'gold clauses' of private contracts for the payment of money." The majority of the Court held that the joint resolution in so far as it affected the "gold clauses" of private contracts, was valid. The Court first discussed the interpretation of the *"gold clauses" in suit and held* that these clauses fairly construed "were intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed." The Court held that the contracts were valid when made, but that Congress had the power under the Constitution to establish a monetary system and invalidate the provisions of existing private contracts which interfered with the exercise of its constitutional authority, and that since there was a reasonable relation between the interdiction of the "gold clauses" *and the monetary policy adopted by Congress,* its action in invalidating the "gold clauses" was not arbitrary or capricious. The Court said:

> "Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." (294 U. S. 307).

The second case, *Nortz v. United States, supra,* presented the question as to whether or not the owner of gold certificates of the United States not holding a federal

license to acquire or hold gold coins, was entitled to receive from the United States, upon surrender of such certificates, a sum in excess of the face amount thereof because the world market price of gold at the time of the surrender was in excess of the currency so received. The plaintiff had been required to surrender his gold certificates and accept legal tender currency in an amount equal to his gold certificates. But at the time his certificates had been surrendered, the dollar had not been devalued and the Act of March 14, 1900, fixing the gold content of the dollar at twenty-five and eight-tenths grains, nine-tenths fine, was still in effect, which meant that the domestic price of gold was exactly equal to the currency received. The Court held that since the currency paid to the plaintiff for his gold certificates was on a parity with that standard of value, the plaintiff did not sustain any actual loss, and since the Court of Claims could not entertain a suit for nominal damages, the petition of the plaintiff should have been dismissed.

In the third case, *Perry v. United States, supra,* the question presented was whether or not the holder and owner of a Fourth Liberty Loan 4¼% bond of the United States was "entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond." Since the bond involved in the *Perry* case was very similar to the bond involved in the present case, and since the government insists that the decision in the *Perry* case is controlling in this case, a more careful and extended consideration of the *Perry* case is warranted.

In the *Perry* case, when the bond was presented for payment, the plaintiff demanded its redemption by the payment of ten thousand gold dollars, each containing

twenty-five and eight-tenths grains of gold, nine-tenths fine, or by the delivery of 258,000 grains of gold, nine-tenths fine, or by payment of 16,931.25 gold dollars each containing 15-5/21 grains of gold, nine-tenths fine, or 16,931.25 dollars in legal tender currency. The United States refused to redeem the bond except by the payment of $10,000.00 in legal tender currency. The plaintiff then brought his suit in the Court of Claims to recover the larger amount. In its opinion this Court first considered the meaning of the "gold clause" contained in the bond or, as the Court phrased it, "the import of the obligation". Pointing out that this bond differed from an obligation of private parties or of states or municipalities "whose contracts are necessarily made in subjection to the dominant power of the Congress", and that the terms of the bond were explicit and expressed not only in the bond itself but definitely prescribed by Congress, the Court said:

> "This obligation must be fairly construed. The '*present* standard of value' stood in contradistinction to a *lower* standard of value. The promise obviously was intended to afford protection against loss. That protection was sought to be secured by setting up a standard or measure of the Government's obligation. We think that the reasonable import of the promise is that it was intended to assure one who lent his money to the Government and took its bond that he would not suffer loss through depreciation in the medium of payment." (294 U. S. 348-9)

The Court then considered "the binding quality of the obligation" and after observing that "there is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional au-

thority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers", held that the Joint Resolution of June 5, 1933, "in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power".

The *Perry* case was a suit against the United States on an express contract to recover damages for breach of that contract. The Court of Claims has no jurisdiction of a suit for nominal damages only. Accordingly, unless the plaintiff could show actual damages, he was not entitled to recover notwithstanding the invalidity of the Joint Resolution of June 5, 1933, as applied to his bond. As stated by the Court:

> "Because the Government is not at liberty to alter or repudiate its obligations, it does not follow that the claim advanced by the plaintiff should be sustained. The action is for breach of contract. As a remedy for breach, plaintiff can recover no more than the loss he has suffered and of which he may rightfully complain. He is not entitled to be enriched." (294 U. S. 354-5)

The plaintiff contended that his damages could be computed by comparing the weight of the gold dollar at the time his bond was tendered for redemption with the weight of the gold dollar at the time the bond was issued. The Court, while recognizing that this might be so if gold had remained in circulation, stated that it was not true in fact because gold had been withdrawn from circulation; there was no free domestic market for gold. Accordingly, the Court held that inasmuch as the plaintiff had offered no evidence of actual damage, he could not recover.

It will thus be seen that the question presented to and decided by this Court in the *Perry* case is quite different from the question presented to this Court for determination now. Only two questions were certified to this Court in the *Perry* case, and only the first of these was answered. This question was:

> "1. Is the claimant, being the holder and owner of a Fourth Liberty Loan 4¼% bond of the United States, of the principal amount of $10,000 issued in 1918, which was payable on and after April 15, 1934, and which bond contained a clause that the principal is 'payable in United States gold coin of the present standard of value', entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond?"

This Court said, "No." The only question decided was that *under the facts of that case* the plaintiff was not "entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond". But the respondent in the case at bar is suing on a coupon and he has not asked for "an amount in legal tender currency in excess of the face amount of the" coupon. He is not suing for any damages caused by the refusal of the government to pay the bond in gold on the redemption date; nor is he asking for any damages caused by the refusal to pay the coupon in gold rather than in other currency. If the respondent were demanding $29.57 in legal tender currency, the *Perry* case might be in point, but since he is demanding only $17.50, it is clearly not in point. This Court decided that inasmuch as Perry had elected to surrender his bond and sue for damages for breach of contract, but had failed to prove damage, he could not recover. This Court did *not* decide

that Perry's *only* remedy was to surrender his bond and sue for damages for breach of contract. The question whether the obligation of the United States to pay interest ceased upon the giving of a notice of redemption without any intention to pay in gold was not considered by the Court. The only provision of the bond construed by the Court was the clause requiring payment in gold. The clauses as to the payment of interest, the meaning of which is here presented to the Court for determination, were not even quoted or referred to in the opinion of the Court in the *Perry* case, much less construed by it.

If payment in gold or an honest intention to pay in gold, was a condition precedent to redemption, and we strongly contend that it was, then the respondent had a right to refuse to surrender his bond except upon a strict compliance with that condition and the question as to whether or not the failure to comply therewith caused him damage was entirely immaterial.

The government reserved to itself an option to redeem its Liberty Bonds prior to maturity. It gave notice that it would redeem, not in accordance with its contract, but on its own terms. The plaintiff in the *Perry* case elected to treat the government as having exercised its option and sued for damages for its failure to do so in accordance with the terms of its contract. The respondent, on the other hand, as we contend he had every right to do, elected to treat the government as having failed to exercise its option. The two cases are manifestly quite different.

B.

The Contract Is Governed By Ordinary Legal Principles.

As will readily be seen from the above discussion, the only substantial question in this case arises out of the interpretation of the contract in suit and for that reason it is necessary to keep always in mind three important and fundamental rules of construction.

First, the contract should be so construed as to effectuate its general purpose, to give effect to the intention of the parties, and to give their ordinary meaning to the words used.

1 Restatement of The Law of Contracts 319, Sec. 235
3 Williston on Contracts (1936) 1777, Sec. 618
2 Elliott on Contracts, 778-781, Secs. 1508, 1509
13 C. J. 531, Tit. "Contracts", Sec. 489

Second, in cases of ambiguity, a contract should be most strongly construed against its author.

> "Where a contract is ambiguous it will be construed most strongly against the party preparing it or employing the words concerning which doubt arises, the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage."
>
> 13 C. J. 544, Tit. "Contracts", Sec. 516

> "If there were any doubt as to the construction which should be given to the agreement of the intestate, that construction should be adopted which would be more to the advantage of the defendant,

upon the general ground that a party, who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him; and on the further ground that when an instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—that one should be favored which standeth with the right."

Noonan v. Bradley, 9 Wall. 394, 407.

See also:

Garrison vs. United States, 7 Wall. 688
Marietta Mfg. Co. v. United States, 73 Ct. Cls. 528
Gibbons v. United States, 15 Ct. Cls. 174
1 Restatement of The Law of Contracts 328, Sec. 236
3 Williston on Contracts (1936) 1788, Sec. 621
2 Elliott on Contracts 807, Sec. 1528.

Third, when contracts are optional in respect to one party, they are strictly construed in favor of the party bound and against the party who is not bound.

3 Williston on Contracts (1936) 1788, Sec. 620
2 Elliott on Contracts 833, Sec. 1548
Pyrate Corp. v. Sorensen, 44 Fed. (2d) 323
Rutledge &c Coal Co. v. Mermod, 237 S. W. 849 (Mo.)
Frank Oil Co. v. Belleview Gas & Oil Co., 119 Pac. 260 (Okl.).

These same general rules of construction are applicable to the contract in this case because the United States are as much bound by their contracts as are private individuals. The same ordinary legal principles govern their contracts as govern the contracts of other persons.

"Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the

United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. * * * When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals * * *. Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit *of public* as well as private debtors."

Lynch v. United States, 292 U. S. 571, 579.

"When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference * * * except that the United States cannot be sued without its consent."

Perry v. United States, 294 U. S. 330, 352

"When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights, and incur all the responsibility of individuals who are parties to such instruments."

United States v. Bank of The Metropolis, 15 Pet. 377, 392.

See also:

United States v. National Exch. Bank, 270 U. S. 527, 534
Reading Steel Casting Co. v. United States, 268 U. S. 186, 188
Hollerbach v. United States, 233 U. S. 165, 171
United States v. Smith, 94 U. S. 214, 217
Cooke v. United States, 91 U. S. 389, 396
Vermilye & Co. v. Adams Exp. Co., 21 Wall. 138, 144
Garrison v. United States, 7 Wall 688, 690
The Floyd Acceptances, 7 Wall. 666, 675.

C.

The Power of the United States to Issue Callable Bonds or Otherwise Manage the Public Debt Is Not at Issue.

In its brief the government states that this case, unlike the *Perry* case involves a consideration of the power to manage the public debt. It is said that the power of the United States to call its obligations for redemption prior to maturity is essential to the proper management of the public debt and the government's brief contains a lengthy discussion of the "Role of Callable Bonds in Public Finance" (pp. 21-33). It is then announced that a decision in favor of the respondent in the present case would seriously affect government financial operations.

We do not challenge the right of the United States to manage the public debt or to redeem their bonds in accordance with their terms. It may very well be that a decision in favor of the respondent would seriously affect *government financial operations* but that depends on the nature of such operations.

Much stress is laid upon the fact that the government can save considerable money by calling its gold bonds and issuing new bonds at lower interest rates. All of this is doubtless true, but it is beside the point. The government no doubt now has, or at least in times past has had, bonds outstanding which it could not call for redemption although if it had had that right it could have saved large sums of interest. But who will contend that the government therefore acquired a right of redemption it never had? In its brief (p. 27) the government refers to the fact that between 1889 and 1891 the Treasury paid premiums aggregating $48 millions in order to retire prior to the first optional redemption date, some $270 millions of outstanding bonds. Could anyone possibly

contend that the government thereby acquired a right of redemption prior to the first optional redemption date specified in the bonds? Such a contention would be absurd, and yet in its essence that is exactly the contention which the government is now making. In effect they are saying we cannot pay in gold; circumstances have altered. Unless it redeems, the government will lose large sums of money through the payment of excessive interest charges. Consequently, the government acquires a right of redemption it never had—it acquires a right to redeem without paying in gold. What is the essential difference between contending that the government can thus acquire a right to redeem without complying with the condition of the bond, and the contention that the government, because interest rates at any particular time may be more advantageous, can acquire a right to redeem a bond before the first optional redemption date specified in the bond? Manifestly, there is no difference. The same argument, in exactly the same words, and with exactly the same basis could be made in support of a contention that the government, if the situation of the money market were favorable, could redeem any of its bonds prior to the first optional redemption date. Perhaps it is unfortunate that the government, because of present circumstances, cannot exercise its right of redemption, but no more unfortunate than if the bonds had been made callable after 20 years instead of after 15 years. In 1917 it was deemed expedient to make the bonds payable in gold; their marketability was thus enhanced and premiums were paid for the bonds which would not have been paid had the bonds not been payable in gold. Perhaps it would have been wiser to have made the bonds redeemable in currency other than gold, but at the time the bonds were issued it seemed expedient to make them

redeemable in gold. The price realized for the bonds was doubtless higher than that which would have been realized had the bonds not been redeemable in gold. Having obtained the advantage resulting from the fact that the bonds were made payable in gold, the government cannot be permitted to disregard the obligation to pay in gold merely because it might be inconvenient to pay in gold at the present time.

II.

THE RIGHT TO REDEEM DEPENDED UPON THE PERFORMANCE OF TWO CONDITIONS, NEITHER OF WHICH WAS IN FACT PERFORMED, ALTHOUGH STRICT PERFORMANCE OF EACH WAS REQUIRED.

A.

An Exact Compliance With the Conditions Attached to a Right of Redemption Is Necessary.

Unless there is an express provision giving a right of prepayment, the obligor on a bond has no right to prepayment. The right to continue to receive interest is a valuable right of which the obligee will not be deprived except strictly in accordance with his contract. It is well settled that in order to avail himself of a right of redemption reserved to him, the obligor must strictly comply with the condition expressed in the bond.

6 Fletcher Cyclopedia of Corporations (Perm. Ed.) 592, Sec. 2731
2 Jones on Bonds (4th Ed.) 210, Sec. 756
Columbia G. & E. Co. v. Knickerbocker Trust Co., 136 N. Y. S. 840
Corbett v. McClintic-Marshall, 17 Del. Ch. 165.

In *Lesman v. Mich. Pen. Car Co.*, 63 N. Y. S. 999, a mortgage provided that bonds should become due upon "any sale of property". The Court in holding that this

meant sale in foreclosure and not a voluntary sale by mortgagor said, p. 1002:

> "If there be any doubt (which we do not think there is) as to what sale was referred to by the use of the words 'any sale' in the ninth clause, then that construction must be adopted which is most favorable to the bondholders, and one which will not impair their security in any way. The defendant obligated itself to pay the principal secured by the bonds on the 1st day of September, 1942; and, under the mortgage securing the payment, it has no right, against the objection of a single bondholder, to pay in advance of that time. The bondholders have a right to insist that defendant shall carry out its contract; that it shall pay its bonds when it agreed to and not before; and that in the meantime the interest shall be paid at the times stipulated."

See also:

Harnickell v. Omaha Water Co., 131 N. Y. S. 489.

In *Sterling v. H. F. Watson Co.*, 88 Atl. 297, (Pa.) a corporation had the right to redeem its preferred stock by payment for the same at par and accrued dividends. The Court held that the corporation could not set off against the redemption price stock dividends previously paid and said, p. 298:

> "It was so stipulated in the contract with the preferred shareholders, and they have the right to insist upon performance according to the terms of that contract."

In holding that the numbers of the bonds purchased and owned by the corporation issuing the same would have to be "put into the hat" when the drawing was made to determine which of the bonds originally issued

were to be called for redemption, the Court of Appeals of New York said:

> "When the bonds in question were issued and negotiated, each bond had an equity represented by the chance that it might not be drawn by lot for redemption until it became payable in 1903. As the bonds drew a high rate of interest, that equity was valuable, and *each bondholder had the right to insist that his bond should not be redeemed except in strict accordance with the contract contained in the mortgage*" * * *
>
> "*They have the right to have their bonds redeemed only according to the contract, and, unless they are so redeemed, to hold them and draw interest upon them until the day of payment shall arrive.* It is only by putting all of the numbers but three in the hat and making one drawing up to date, and subsequent drawings on the same basis, that the 187 bonds outstanding will have their equities preserved, and suffer only the chance of redemption that the sinking-fund clause provides."
>
> Mo. Rwy. Co. v. Union Tr. Co., 51 N. E. 309, 311-312 (N. Y.) (Italics ours)

In *Randolph v. Middleton,* 26 N. J. Eq. 543, a statute passed after the issue of the bonds in suit provided for sales in insolvency cases free from prior liens. The decree appealed from directed that the property be sold free from the lien of mortgages and provided for the payment of the mortgage bonds out of the proceeds of sale. The Court held that the maturity of the bonds could not be anticipated by sale and that the statute could not alter the provisions of the bonds. The Court said p. 546:

> "It is certain, in a contract for a loan of money, the time fixed for repayment is a material matter, so that to hasten or postpone such period is to alter such contract in point of substance. If I lend a sum

> of money on a credit of ten years, it seems certain that I cannot be compelled to accept repayment at any period short of the time so fixed, by force of any legislative act which can be subsequently framed."

In *Chicago & I. R. v. Pyne,* 30 Fed. 86, the mortgage provided for a sinking fund of earnings of the mortgagor "for ultimate redemption" of the mortgage bonds, but no definite date of redemption prior to maturity was fixed. The company sought to redeem the bonds as soon as the sinking fund was large enough for that purpose. In denying the right of redemption before maturity, the Court said, p. 90-91:

> "If it were necessary, the rule of interpretation might be invoked that, where doubt exists as to the construction of an instrument prepared by one party, upon the faith of which the other party has parted with his money, that construction shall be adopted which will be favorable to the latter. Noonan v. Bradley, 9 Wall. 395. But it is not necessary to rely upon this rule of construction of contracts. * * * It is not to be supposed that the Chgo. & Iowa Co. designed to ingraft conditions upon the bonds which would make them less desirable for the class of investors who purchase such securities, and thus impede their negotiation upon the best terms. Such would indubitably be the effect of the contract if it were to be read as is now insisted by the complainants, because it would require the bondholders to accept payment, and surrender their investments, at a time which they could not foretell, and depending wholly upon the contingencies of the traffic contract between the two railroad companies.
>
> "* * * The contract should therefore be construed as intended to strengthen and fortify the bonds, and not as intended to require the bondholders to surrender their investment at an earlier time than is provided for in the bonds."

Likewise, in Texas & Pacific R. R. v. Marlor, 123 U. S. 687, it was held that where an obligor had the option to pay interest coupons in scrip if its earnings were not sufficient to enable it to pay in cash, but failed to notify the bondholders of its election to exercise its option to pay in scrip on or before the due date of the coupons, the obligor cannot thereafter elect to pay the coupons in *scrip but must* pay in cash.

It will be noted that in none of the cases cited did the Court hold that upon the failure of the obligor to comply with the condition attached by the contract to his right of redemption, the only remedy of the bondholder was a suit for damages. On the contrary, the Court in each instance held that the right of redemption could not be exercised because the condition attached to that right had not been strictly complied with. There was no inquiry as to whether a failure to comply with the condition would cause damage to the bondholders. The question of damages was entirely immaterial.

The government attempts to distinguish the cases cited by saying that in those cases the call was in terms to pay something less than was due, whereas in the present case the call "bound the government to perform whatever its obligation required it to perform". But the point is that something *different* was tendered. It makes no difference whether what was tendered was more or less than what was due. Only the fact that it was *different* is important.

In the case at bar the government contends that it has exercised its right of redemption and complied with the conditions attached to that right. But, as said by this Court in the *Perry* case "the terms of the bond are explicit" (294 U. S. 348). It provides: "The principal

and interest of this bond shall be payable in *United States gold coin* of the present standard of value". The statute pursuant to which the bonds were issued (40 Stat. 35) and the general law (U.S.C., Tit. 31, §768) likewise required payment of both principal and interest in gold coin. There was no provision for payment in any other kind of money or in any other medium, and of course payment in gold coin was required upon redemption just as well as at maturity.

This obligation to pay in gold coin Congress recognized but attempted to repudiate by the Joint Resolution of June 5, 1933. This Court held that this could not be done and that in so far as it attempted to override the obligations of the United States, the Joint Resolution was a nullity. Consequently the provisions of the bond remain unaltered and the United States are clearly obligated to pay the respondent $1,000.00 in gold coin in order to redeem his bond.

Perry v. United States, 294 U. S. 330.

The government contends that the giving of a notice is the only condition attached to the right of redemption but actually there are two conditions attached to the right of redemption, the one a condition precedent and the other a concurrent condition. The provision requiring the giving of a notice of redemption was the condition precedent. The requirement that the principal be paid in gold coin was the concurrent condition. Under the rule laid down by the cases above referred to, strict compliance with both conditions was required. But the fact is that there was compliance with neither condition. Consequently, the respondent's bond was not redeemed on June 15, 1935.

B.

The Notice Issued on March 14, 1935, Was Not a Valid and Bona Fide Notice Such as Was Contemplated in the Bond.

The right of the government to redeem the respondent's bond was expressly conditioned upon the publication of a notice of redemption three months in advance of the redemption date. The government concedes that publication of a notice was a condition precedent to the right of redemption but contends that the notice issued on March 14, 1935, was a substantial compliance with that condition. But substantial compliance is not sufficient. Under the authorities there must be *strict* compliance. And whatever else may be said of the notice of March 14, 1935, it was certainly not a strict compliance with the condition expressed in the bond.

The contract provides that the bonds may be "*redeemed and paid* at the pleasure of the United States * * * at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date * * *." Now, what kind of a notice is required by this language of the bond? Obviously, a notice that the bond will be "*redeemed and paid* * * * at the face value thereof". And since the only medium of payment provided for in the bond was gold coin, it is clear that the notice required in order that the respondent's bond could be redeemed on June 15, 1935, was a notice that on that date the bond would be redeemed by the payment of $1,000.00 in gold coin of the United States of the standard of value existing on June 15, 1917. Can there be any doubt that such was the condition expressed in the bond? We think not, but if there is any doubt, then such doubt must be resolved in favor of the appellant because the language used was the language

of the government and because the right of redemption was optional in favor of the government. (See authorities cited, supra, pp. 20-21). And even if the language were not so clear, reason and justice would require that the notice to be issued be a *bona fide* indication of the intention of the government to do that which it was admittedly bound to do—redeem by payment in gold coin.

Now was this condition strictly complied with? Was a *bona fide* notice published? The notice of March 14, 1935, was most certainly not a notice that the bond would be redeemed by the payment of $1,000.00 in gold coin. We cannot close our eyes to the fact that it was actually a notice of payment in depreciated currency—not in gold coin as required by the bond. At the time the notice was issued the government had not the slightest intention of paying in gold coin on the redemption date. Gold coin had been withdrawn from circulation and the currency had been devalued. The Secretary of the Treasury had publicly announced that the gold coin would not be paid. Congress had passed the Joint Resolution of June 5, 1933, declaring that no payments should be made in gold coin and attempting to abrogate the gold clause in government bonds. The Resolution declared that no provision giving to the obligee a right to require payment in gold coin "shall be contained in or made with respect to any obligation hereafter incurred". Theretofore all holders of gold had been required, under threat of a penalty, to surrender all gold to the United States. As early as January 30, 1934, Congress had required that all gold coin be withdrawn from circulation and melted into bars and that "no gold shall hereafter be coined, and no gold coin shall hereafter be paid out or delivered by the United States." Fiscal agents of the government were not authorized to pay in gold, but were directed to make payments of bonds

tendered for redemption only in currency other than gold (R. 11). And when bonds had been presented and payment in gold demanded, it had been refused (R. 11).

It is true the notice did not specifically state that the bonds would not be paid in gold. Neither did it state the bonds would be paid in gold. But how could the Secretary of the Treasury give a notice that bonds of the United States would be redeemed and paid in gold coin when the laws of the United States provided that no gold should be coined or paid out, or delivered by the United States? In the light of these facts, can it be said that the notice was anything more than a notice that the bonds would be paid only in depreciated currency? And yet the bonds were payable in gold coin. How can it be said that such a notice complied with the contract? How can it be said that the condition precedent, strict compliance with which is required by law, has been complied with at all?

Suppose on March 14, 1935, the Secretary of the Treasury had published a notice to the effect that on June 15, 1935, the 3½% Liberty Bonds would be redeemed by payment of $500 for every $1,000 bond. Could it be said that this would have been a valid notice of redemption under the contract any more than a notice published two months before the redemption date instead of three months as required by the bond would be a valid notice? Manifestly not. And yet this is just what was done. The government indicated that it would pay in depreciated currency but not in gold coin.

The comparative values of the gold dollar and the depreciated dollar are not in controversy. The respondent bargained for gold coin, not paper money. The bond clearly required a notice of redemption in gold coin. And

although the notice did not specifically state in so many words that payment would not be made in gold coin, it surely did in substance in view of the surrounding circumstances. Whether gold was worth more or less than the depreciated currency was entirely immaterial. The condition precedent must be strictly complied with before the respondent can be required to surrender his bond.

In the lower Court the government argued that the Court could not go behind the language of the call and that a notice was sufficient which did not say or mean to say that the bonds would be redeemed in gold coin. This argument is now abandoned and it is now argued that the notice did not commit the United States definitely to payment of either gold coin or legal tender currency. It is said that the notice was intended as a notice that the United States would pay whatever they were obligated to pay and that it should be so construed. In other words, if the United States were obligated to pay in gold coin, then the notice was a notice of payment in gold coin; if the United States were obligated to pay in legal tender currency in an amount in excess of the face amount of the bond, then the notice was a notice of payment in legal tender currency in some indeterminate amount in excess of the face amount of the bond. But this is a mere equivocation and it does not square with the facts. If ever anything were certain, it is that the notice of March 14, 1935, was intended as a notice to pay the face amount of the bonds mentioned in legal tender currency and nothing more.

How can it possibly be said that if the government were obligated to pay in gold coin, then the notice was a notice of payment in gold coin? There was no gold

coin in existence. Time and time again it had been announced that no gold coin would be paid. The Gold Reserve Act of 1934 expressly prohibited the Secretary of the Treasury or any other fiscal agent of the United States from paying gold coin for any purpose whatsoever. In addition to this, the Joint Resolution of June 5, 1933, specifically provided that any obligation which purports to give the obligee a right to require payment in gold is against public policy "and no such provision shall be contained in or made with respect to any obligation hereafter incurred". Prior to March 14, 1935, the United States were under no obligation to pay the respondent's bond on June 15, 1935, and any action which matured that bond prior to June 15, 1947, created a new obligation. Is the Secretary of the Treasury omnipotent? Could he override the will of Congress and obligate the United States to pay the respondent's bond in gold coin on June 15, 1935, when Congress had said that no such obligation should be incurred? Could he pay the respondent gold coin when Congress had said he should not do so? Merely to state the proposition shows its absurdity.

As said by the lower Court (R. 31):

> "When the Secretary of the Treasury has been forbidden by law to pay gold out of the Treasury and has been required to discharge bonds tendered for redemption with currency based on a 15-5/21 grain dollar, it is idle to contend that a notice to redeem means that he stands ready to redeem in accordance with the promise of the bond, i. e., in gold coin based upon a 25-8/10 grain dollar."

And the same answer might be made to the contention that the notice of redemption, if necessary, might be construed as a notice to pay in legal tender currency

in an amount in excess of the face amount of the bonds. For not only does the Joint Resolution forbid the creation of any obligation payable in gold coin, it likewise forbids the creation of any obligation giving to the obligee a right to payment of an amount of money measured by gold. Could the Secretary of the Treasury disregard this prohibition placed upon him by Congress? Of course not. And the Secretary of the Treasury never attempted to do so. The circular issued by him with the notice of March 14, 1935, expressly states that the bond will be paid at par. Since payment in legal tender currency only was contemplated, how can the notice possibly be construed into a notice of an intention to pay something in excess of par?

The Government's own brief shows the fallacy of the argument. There (p. 40) it is indicated that although the Secretary of the Treasury was not authorized to pay the bonds otherwise than dollar for dollar in legal tender currency he might have been able to pay in gold coin or in legal tender currency in an amount in excess of the face amount of the bonds if there had been "an authoritative determination" that the bondholders were so entitled. This was at best a tender of a law suit; it was certainly not a tender of gold coin. And even if there had been "an authoritative determination" that the bondholder was entitled to gold coin and a judgment rendered for the amount of his bond in gold coin it would not have been paid because the Gold Reserve Act of 1934 prohibits the payment of gold coin in satisfaction of a judgment just as it prohibits the payment of gold coin for any other purpose.

We do not contend, as the government argues, (Brief pp. 38-39, 42-43) that under no circumstances could a call

for redemption offer to pay whatever the obligor was obligated to pay. In the ordinary case it might be possible to make such a call and in that event the amount due could be determined by a suit on the principal obligation. But that is not the situation presented here. The whole point is that the notice in this case, when read in the light of the existing statutes, very definitely tendered a particular amount and mode of payment, different from that contracted for.

Nor did the decision in the *Perry* case "conclusively establish" that the call was sufficient "to subject the United States to an accelerated liability to the full extent of its obligation". As the government in its brief points out (p. 70), the claimant in the *Perry* case did not question "the right of the government to discharge its obligation by payment in legal tender currency". As a matter of fact, the call in the *Perry* case was made before the passage of the Gold Reserve Act of 1934 and before the devaluation of gold and neither the form of the notice nor the provision of the bond respecting redemption were before the Court. The question was not certified by the Court of Claims and it was not referred to in the briefs of opposing counsel or mentioned in any of the opinions. How can it be said that the *Perry* case conclusively established the validity of the call when the question was not even considered?

We respectfully submit that the notice issued on March 14, 1935, was not a notice in accordance with the contract. It was certainly not a strict compliance with the condition precedent and the respondent had a legal right, under the circumstances, to treat it as a nullity.

C.

The Interest Coupons Did Not Become Void Except Upon Actual Redemption of the Bond by Payment in Gold Coin.

Even if it could be said that the notice issued on March 14, 1935, was a sufficient notice to entitle the government to redeem the respondent's bond on June 15, 1935, the fact remains that it was *not redeemed* by payment in gold coin nor was there any willingness to redeem in gold coin. The government acknowledges that the respondent may have a right to receive gold coin and admits that if so, it has broken the contract by refusing to pay in gold coin and that in such event, it is liable for damages for such breach (as indeed it must under the decision in the *Perry* case), but contends that even though payment in gold coin were required, it was not a condition and failure to pay in gold coin did not prevent redemption. This is not the case.

The requirement that upon redemption the principal of the bond be paid in gold coin was clearly a concurrent condition to redemption. Without strict performance of the condition there could be no redemption. Not only is the intention of the parties as gathered from the entire contract clear that payment is a concurrent condition to redemption, but such is expressly provided.

The bond provides that any of the bonds may be "*redeemed and paid* at the pleasure of the United States". The expression used is "redeemed *and* paid"; the two are synonymous. In the very clause which gives the right of redemption, the condition upon which that right depends is *expressly* inserted. The bond provides for payment in one medium and one medium only—gold coin. It is abundantly clear, therefore, that the government's right of redemption is expressly conditioned upon payment in gold coin.

Even if there could be any doubt as to payment in gold coin being a condition to redemption, the general rule of interpretation would remove all such doubt since even the government admits that under the contract payment in gold coin may be due on the date of redemption. The rule is stated in 1 Restatement of The Law of Contracts, 386, sec. 267, as follows:

> "Promises for an agreed exchange are concurrently conditional, unless a contrary intention is clearly manifested, if the promises can be simultaneously performed and the parties can be assured that they are being so performed, where by the terms of the promises
>
> (a) the same time is fixed for the performance of each promise; or
>
> (b) a fixed time is stated for the performance of one of the promises and no time is fixed for the other; or
>
> (c) no time is fixed for the performance of either promise; or
>
> (d) the same period of time is fixed within which each promise shall be performed."

And again:

> "Since concurrent conditions protect both parties, courts endeavor, so far as is not inconsistent with the expressed intention of the parties, to construe performances of mutual promises as concurrent conditions."
>
> 3 Williston on Contracts (1936), p. 2333, Sec. 835.

See also:

Bank of Columbia v. Hagner, 1 Pet. 455, 464-5
Dunn v. Oneida Community, 177 Fed. 540
Phillips &c. Const. Co. v. Seymour, 91 U. S. 646, 650.

And the condition is one implied in fact as distinguished from one implied in law with which in some cases a substantial instead of a strict compliance may be sufficient. The rules above quoted are rules of interpretation and once ascertained, the intent of the parties must be given effect.

1 Restatement of the Law of Contracts, §253.
3 Williston on Contracts (1936) pp. 1921-2, §§668, 669.

Now, if this be so, the respondent is clearly right in treating as a nullity the attempted redemption by payment in devalued currency. If payment in gold coin is required, such payment is a concurrent condition which has not been performed and it makes no difference whatsoever that the respondent has or has not been damaged by failure to perform that condition. The fact that gold was not obtainable was no excuse, because in the first place it was unobtainable only because the United States chose to make it unobtainable, and in the second place the fact that performance of a condition is impossible does not give one the right to ignore the condition and demand performance from the other party. Failure to strictly perform the condition absolutely defeats the right of redemption and the questions of damage and impossibility of performance are entirely immaterial. This rule is not only supported by authority, but it is inherently fair and just.

> "So long as the basis of contractual obligation is the expressed intent of the parties, the boundaries of a promisor's liability must be fixed by the terms of his promise. Where, therefore, A promises B to do something if a certain contingency happens or if B renders some performance, there is no breach of promise, and logically, therefore, no liability unless

that contingency happens or that performance is rendered, even though this result is due to no fault of the promisee and could not have been prevented by him."

Williston on Contracts (1936), Vol. 3, p. 2269, sec. 808.

"As a general rule conditions which are either expressed or implied in fact must be exactly fulfilled or no liability can arise on the promise which such conditions qualify. The reason for this is obvious. The promisor can only be held liable according to the terms of the promise which he makes. If he promises five dollars, he cannot be made to pay $5.01. For the same reason if he makes a promise to do an act on condition that he receives $5.01 he cannot be required to perform on being paid $5. The condition is part of his promise qualifying and limiting it, and his promise as a matter of plain fact is not broken until the condition has happened or been performed. * * * Similarly insurance policies, building contracts, contracts of sale, and other contracts, frequently contain express conditions which must be exactly performed in order to create liability on the contract; and the fact that non-performance of the condition or incomplete performance of it has caused no injury to the promisor is immaterial."

Williston on Contracts (1936), Vol. 3, pp. 1940-1941, sec. 675.

"Concurrent conditions are in legal effect mutual conditions precedent. Therefore, if each party fails to comply with the condition qualifying the other's promise, neither can acquire a right upon it, and if by lapse of time fixed by the contract, or of an unreasonable time if no time was fixed, the conditions become impossible of performance, the contract is discharged."

3 Williston on Contracts (1920), p. 3348, sec. 1970.

"It is simple justice between two parties to a contract containing depending stipulations that neither should be permitted to exact performance by the other without having himself first performed. * * * A judgment for failure to perform against one party in favor of the other, when the latter was the first delinquent, is offensive to the sense of righteousness and fair dealing."

Mut. Life Ins. Co. v. Hill, 193 U. S. 551, 559.

"Where an act is to be performed by the plaintiff before the accruing of the defendant's liability under his contract, the plaintiff must prove either his performance of such condition precedent, or an offer to perform it which the defendant rejected, or his readiness to fulfill the condition until the defendant discharged him from so doing, or prevented the execution of the matter which the contract required him to perform."

Jones v. U. S., 96 U. S. 24, 27.

"* * * Where the stipulations of a contract are interdependent, a defendant cannot be sued for the non-performance of stipulations on his part which were dependent on conditions which the plaintiff has not performed."

The Tornado, 108 U. S. 342, 351.

"Where a specified thing is to be done by one party as the consideration of the thing to be done by the other, it is undeniably the general rule that the covenants are mutual, and are dependent if they are to be performed at the same time; and if, by the terms or nature of the contract, one is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done or tendered, before that party can sustain a suit against the other. There is no doubt that in this class of contracts, if a day is fixed for performance the party whose duty it is to perform or tender

> performance first must do it on that day, or show his readiness and willingness to do it, or he cannot recover in an action at law for non-performance by the other party."
>
> Phillips &c. Constr. Co. v. Seymour, 91 U. S. 646, 650.

We have been able to find but one case (*Gordillo v. Weguelin*, 5 Ch. Div. 287, discussed *infra* pp. 51-53) which presents a situation exactly like that presented in the case at bar. This is to be expected because, of course, a situation in which an obligor of a bond would call a bond for redemption and then refuse to make payment thereof is very unlikely to arise. In effect, however, the bond gives to the government an option to redeem upon payment of the principal in gold coin and while this is not a suit for specific performance, nevertheless the government, by asking the court to hold that the coupon sued on became void on June 15, 1935, is in reality asking for specific performance of its option agreement. For this reason some cases dealing with options to purchase real estate may be helpful inasmuch as the same principles are applicable. The general rule is well settled and is stated clearly in 58 C. J., 1103, Tit. "Specific Performance", sec. 376, as follows:

> "If by the terms of an option, payment of the whole or part of the consideration is intended to constitute the act of acceptance, not only is it essential that the consideration for the resulting contract be paid or tendered, so as to vest the equitable estate in the purchaser, but the time of such payment or tender is essential, and in accordance with general rules payment must be made within the time stipulated in the option or within valid extensions thereof."

In *Hunt v. Bassett,* 168 N. E. 783 (Mass. 1929), a lessee had an option to purchase the leased premises during the term. He had negotiations with the landlord as to the purchase during the term and tendered a note secured by a mortgage as a down payment. He did not, however, tender the whole purchase price nor prove that during the term he had been ready and willing to do so. Upon the landlord's refusal to convey the property, he brought suit for specific performance. In denying specific performance, the Court said, p. 784:

> "If the plaintiff has so exercised his rights under the option so as to be entitled to a conveyance of the property, the payment of money by him and the delivery of a deed by the defendant would occur at the same time. The conditions are concurrent and mutually dependent. In such a case it is not necessary for the plaintiff to make an actual tender of the purchase money until he receives the deed and it is not necessary for the defendant to deliver the deed until he receives the purchase price. But if the plaintiff did not tender the purchase price he was bound to prove at least that he had offered and demanded performance within the terms of the lease and also, apart from waiver, that he was within the term ready, willing, and able to carry out his part of the transaction."

In *Richardson v. Hardwick,* 106 U. S. 252, 255, it was said:

> "In suits upon unilateral contracts, it is only where the defendant has had the benefit of the consideration for which he bargained that he can be held bound."

In *Lau v. McKechnie,* 168 N. W. 438 (Mich.) a lessee had an option to purchase the leased premises during the term for a stipulated price. Three days before the

end of the term he notified the lessor that he was exercising his option and on the last day of the term he sent the lessor a check for $100.00 to be applied on the purchase price. The Court said, p. 440:

> "By the terms of the option, plaintiff was given the privilege of purchasing the premises for a stated sum within a stated time. The language of the option contemplates a cash payment within the life of the lease. The mere announcement by plaintiff within the time that he was ready to purchase the property is not enough. He was not given the privilege of purchasing the property if he signified his acceptance of the offer before the expiration of the lease, but was given the privilege of purchasing it. He must be something more than ready to purchase; he must actually purchase it before the lease expires by paying or tendering the consideration. For his failure to do so he must be denied relief. * * *"

Likewise in the case at bar the government was not given the privilege of signifying its intention to redeem the respondent's bond, but was given the privilege of redeeming it. And it should also be noted that in this case, as in the case at bar, a part payment only was tendered. But the Court did not say that the option had been exercised and that the only remedy of the lessor was a suit for damages. On the contrary it was definitely decided that all rights under the option had been lost.

In *Ranelagh v. Melton*, 2 Dr. & Sm. 278 (High Ct. of Chan. 1864) the plaintiffs were lessees under leases containing an option to purchase within a seven years' period upon the giving of a three months' notice to the lessor. The seven years' period expired on June 24, 1863. On March 20, 1863, the required notice was served on the lessor but nothing further was done until July 1st

when the plaintiffs' solicitor sent the defendant draft conveyances for his perusal. The defendant refused to complete the sale. In refusing to grant specific performance, the Court said, p. 282:

> "The Court regards it as a case of a condition on the performance of which the party performing it is entitled to a certain benefit; but in order to obtain such benefit he must perform the condition strictly. Therefore, if there be a day fixed for its performance, the lapse of that day without its being performed prevents him from claiming the benefit. Applying that rule to the present case; if the agreement fixes a day for payment of the money, then it is clear that if that day is past without the payment, the right to compel a conveyance is lost."

In none of these cases was there any inquiry as to whether the failure to perform the condition had caused damages to the other party. And yet is not the situation in these cases essentially the same as in the case at bar? The government had an option to redeem conditioned upon payment. Or, looking at it in another way, the bondholder agreed that upon payment in gold coin on the redemption date, he would surrender his bond and subsequent coupons would become void. But the government seeks to redeem without payment. It, in effect, asks for specific performance of its option agreement without performing the condition upon which it is predicated. This it is not entitled to have.

The government contends that by the agreement the obligation to pay interest was to cease upon the issuance of a notice of call and the passage of time to the date designated in such notice. It is said that by the terms of the bond, the United States were obliged to pay interest only until the principal became "payable", that the notice of

call for redemption made the principal "payable" and hence terminated the obligation to pay interest; it is also said that by the terms of the bond the United States were obliged to pay interest only "until the date of redemption designated", that the notice issued by the Secretary of the Treasury designated a date of redemption, and that accordingly interest ceased on that date and subsequent coupons became void.

But such reasoning as this completely ignores the very obvious intention of the parties as expressed in the language used in the bond. The contract is not construed; it is destroyed.

As said by the Court of Appeals of New York in *Atwater & Co. v. Panama R. Co.*, 159 N. E. 418, 419:

> "Contracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions without regard to the surrounding circumstances or the apparent purpose which the parties sought to accomplish. • • • The Court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance, and a sensible meaning of words should be sought."

The bond provides: "The United States • • • promises to pay to the bearer • • • interest at the rate of 3½ per centum per annum payable semi-annually • • • until the principal hereof shall be payable • • •". In the very next sentence the bond provides that the "principal and interest of this bond shall be payable in United States gold coin • • •". Clearly then the United States

has promised to pay interest until the principal of the bond shall be payable in gold coin of the prescribed standard.

When the bond as a whole is considered, it seems obvious that it was intended as a definite obligation of the United States to pay interest so long as they had the use of the bondholder's money. When the bonds were issued, no one supposed that the United States could terminate their obligation to pay interest except by tendering payment of the principal in accordance with the terms of the bond. And yet if our opponents' contention be correct, the United States could terminate this solemn obligation at any time by the simple expedient of issuing a notice of redemption. It makes no difference, they say, that the notice is not *bona fide,* that the United States, at the time they issued the notice, had no intention of paying in gold coin, and that on the day of redemption they refused to pay in gold coin. If this be true, it logically follows that the United States could announce that they would pay only $500.00 for each $1,000.00 bond or, indeed, announce that they would pay nothing for each bond, yet, if the notice issued, interest ceased. But, our opponents answer, if this were done, the bondholder could sue, and, if he prove damage, recover the amount of his damage. This is no answer at all.

As pointed out by our opponents, the United States are not liable for non-contractual interest (Angarica v. Bayard, 127 U. S. 251, 260; Seaboard Airline Ry. v. U. S., 261 U. S. 299, 304; U. S. v. North Am. Co., 253 U. S. 330, 336) so that even if the bondholder could sue for damages and recover, he could not recover interest. If the government's contention be correct, the bondholder could be completely deprived of his

interest, the only real inducement for purchasing the bond. And yet they say that this is the meaning of the contract.

Suppose, instead of issuing a notice of call for redemption, the United States had simply announced that after June 15, 1935, First Liberty 3½% bonds should bear interest at 2⅞%. Would anyone have contended that the United States were within their rights in thus arbitrarily reducing the interest rate? And yet that is exactly what has been attempted here. The only difference is that here the same purpose is sought to be accomplished indirectly. Of course the United States have a perfect right to accomplish this purpose by *actual redemption in accordance with the terms of the bond*. But this they have not done. If they can redeem by payment in currency other than gold coin, then they should be able to redeem by payment in any medium—as for instance, by offering a 2⅞% bond in payment. Our opponents would argue, we suppose, that in such a case the bondholder would be remitted to a suit for damages. And if the market value of the new 2⅞% bond should be the same as the old 3½% bond, there could be no recovery. The bondholder would have his 2⅞% bond but no more. Or suppose the government should decide to redeem 3½% bonds, payable in 1947, and offer in payment therefor 3½% bonds payable in 1945. The market price of the two bonds might very well be the same so that the bondholder would sustain no provable damage. Could it be said that he would be forced to submit and surrender his 1947 bond? If they can do this, then logically, they should be able just arbitrarily to change the interest rate on the outstanding bonds without redemption. Yet no one will contend that this can be done.

When these bonds were issued they were made payable in gold and the interest rate fixed at 3½%. Why? Because the government was in need of money. It had to borrow, and the bonds were made as attractive as possible to investors in order that the money would be forthcoming promptly. The rate of interest was a most important consideration, so important that the government agreed that if it should later issue bonds at a higher rate of interest, the bonds then issued could be exchanged for the bonds bearing the higher rate (R. 12-13). Why insert such a provision if interest were payable only at the whim of the government? And if the government had announced that it could at any time terminate its obligation to pay interest—in other words, that interest would be payable at the pleasure of the government—would the bonds have been sold? Of course not. They were purchased in the belief that the United States would pay interest until they were ready to repay the full amount of the principal in gold coin.

Can we assume that the government intended otherwise? Must we assume that, knowing the bonds would be purchased by its citizens in the belief that they were to bear interest until repaid, the government craftily contrived to use language which would foster this impression and yet leave the door open to a different construction? If so, the rule stated above (pp. 20-21) would prevent any such result.

But it is not at all necessary to make any such assumption. The reason for using the expression "until the principal hereof shall be payable" rather than "until the principal hereof shall be paid" is abundantly clear. It was known of course that the bonds would be eventually held by a vast number of persons both in this country and

abroad. The bonds were negotiable, they were not necessarily registered, and it would be impossible for the United States to know who might be at any time the holders of the bonds. It would easily be possible for a holder to have no actual notice of a redemption and he might not therefore surrender his bond for some time after the date fixed for redemption. In such cases, since the United States would be ready and willing to pay the principal on the day designated and would fail to do so simply because, the bond not being surrendered, they would have no way of knowing who to pay, it was intended that the obligation to pay interest would cease. Likewise, a bondholder might negligently fail to present his bond for payment and in such case, since the money was available for him, it was only proper that his interest should cease. It was necessary to insert such a provision in the bond because otherwise a bondholder might require the government to continue to pay him interest by merely refusing to surrender his bond, thereby defeating the right of redemption altogether. Hence it was provided that interest would cease when the principal became payable—i. e., when the United States was ready and willing to pay the principal—and the failure to pay was due simply to the failure of the holder to surrender his bond so that the United States could pay. In effect, the interest was to cease when the United States, within the time and in the mode provided in the bond, tendered payment.

This is made abundantly clear in the very similar case of *Gordillo v. Weguelin*, 5 Ch. Div. 287. In that case a mortgage bond indenture provided for semi-annual redemption of bonds by lot and provided that the numbers of the bonds drawn for redemption should be advertised in a newspaper one month before the redemption date. The indenture provided for the payment

of interest semi-annually "up to and including the day on which the said principal sum shall become payable upon presentation", and also provided, "But no interest shall be payable on any drawn bond after the day fixed for its redemption". Certain bonds were drawn for redemption but were not paid on the redemption date. The mortgaged property was placed in the hands of Trustees and the question arose as to whether or not the holders of the bonds which had been drawn for redemption but had not been redeemed and paid were entitled to be paid interest. On appeal it was contended that the interest as such ceased on the redemption date and that any interest allowed thereafter was allowable as damages only and not as interest secured by the bond and that, accordingly, the holders of the drawn bonds were not entitled to interest, or at least were not entitled to interest pro-ratably with the holders of the undrawn bonds. In speaking of this contention James, L. J., said:

> "That would be perfectly right on the assumption that if the funds are there for payment of the bond, the holder ought to tender the bond for payment, and he could not be allowed to go on getting interest against his debtor if the time had arrived when he was bound to accept repayment and the debtor had provided the requisite funds. * * *
>
> "I am of the opinion that upon the whole deed what was intended was that the interest should run until the bond was paid or until it was payable according to the terms of the deed, that is, *de facto* payable out of funds provided for that purpose. When the bonds were in truth payable, not payable in the sense of the money being recoverable in an action at law, or anything of that kind, but payable by reason of the fund being provided for the purpose of paying them, either in the hands

> of the contractors or received by the Trustees, then the interest would cease, and until it was so payable, in truth and in fact, as well as in legal right of action, then interest runs."

The other contention made by the government is that the bond obligated the United States to pay interest only until the date of redemption designated in a notice of call and that since a notice of call was issued, interest ceased on the day designated. This contention also ignores the obvious intent of the parties.

The bond provides: "All or any of the bonds of the series of which this is one may be *redeemed and paid* at the pleasure of the United States on or after June 15, 1932 * * *". After providing for the giving of notice of redemption and the method of selecting the bonds to be redeemed, it is provided:

> "From the date of redemption designated in any such notice, interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void."

It is obvious that this provision was inserted merely in order to make clear that when the United States by issuing a notice of call for redemption signified that they were ready and willing to pay the bonds, their obligation to pay interest was to cease. Why was interest to cease on the date fixed for redemption rather than on the date of the issuance of the call or, indeed, any other date which might be selected? Obviously, because the date of redemption was the date fixed for *payment*. It is idle to argue, as the government does, that the contract did not require a *redemption*, but merely the arrival of the "*date of redemption designated*" in order for interest to cease.

The bond also provided that it could be "redeemed and paid * * * at the face value thereof and interest accrued at the date of redemption." There can certainly be no question that "date of redemption" here means the date when redemption is made, the date when payment is tendered. This provision at least means that the bondholder is entitled to his interest until payment of the principal is tendered. If there can possibly be any conflict between the two provisions, then certainly the doubt should be resolved in favor of the bondholder. But there is *no doubt*. The clear intent of the parties was that tender of payment of the principal and cessation of interest went hand in hand—they were to happen simultaneously.

The government relies upon *Morgan v. United States*, 113 U. S. 476. In that case the United States arranged to call for redemption a number of outstanding bonds which were redeemable and simultaneously issue new bonds bearing a lower interest rate. Morgan & Company bought up large quantities of the bonds which had been called for redemption, including certain bonds which had been owned by the Manhattan Savings Bank but had been stolen from it. The serial numbers on the stolen bonds had been altered and Morgan & Company, of course, had no knowledge that the bonds had been stolen. When this fact became known, the Manhattan Savings Bank claimed payment of the bonds from the Treasury Department. The Treasury Department refused payment to both Morgan & Company and the Manhattan Savings Bank and submitted the question to the Court of Claims. It was admitted that Morgan & Company had no knowledge of any circumstances which would have put them on notice that the bonds had been stolen,

but it was contended that inasmuch as the bonds had been called for redemption, they had become overdue obligations and hence had lost their negotiable character so that Morgan & Company were not entitled to the rights of a *bona fide* holder for value, but instead took only the title of their assignors. The Supreme Court in a lengthy opinion held that the fact that the bonds had been called for redemption did not make them overdue obligations and non-negotiable.

It is difficult to see just what bearing this decision has on the case here presented. It is true that in the course of its opinion, in speaking of the notice of redemption, the Court said: "The legal effect of the call undoubtedly is to entitle the holder to demand payment at its maturity, and, even though not demanded, to exonerate the government from liability for interest accruing after that date;". This language is relied upon by our opponents in support of their contention, but it is obvious, when the facts of the case are considered, that the Supreme Court did not at all have in mind a situation such as that presented now. In that case the bonds provided that they were "redeemable at the pleasure of the United States." They contained no provisions as to notice or as to when interest ceased nor were they expressly made payable in gold. The "pleasure of the United States" was evidenced by the act of July 14, 1870, which authorized the Secretary of the Treasury to redeem the bonds. That Act expressly provided that notice of redemption should be given only after the Secretary of the Treasury had in hand sufficient coin to pay the bonds. The notice issued stated that the bonds would be *paid* on the day designated and before the notice was issued the Secretary of the Treasury had

made arrangements to obtain the coin with which to pay the bonds. In other words the United States stood ready and willing to pay its redeemed bonds in accordance with their terms and in such a case the legal effect of the call undoubtedly was to exonerate the government from liability for interest accruing after the maturity of the call. The very language used by the court indicates that it, of course, was not at all contemplating a situation where payment is refused. The Court simply said that if the United States in accordance with its agreement *notifies the holder of the bond* that it is ready to pay at a time when it is actually ready to pay, the holder is entitled to demand payment, and if he fails to demand payment, the government's obligation to pay interest nevertheless ceases. The Court did not undertake to say that the obligation to pay interest ceased if the government refused to pay or if it issued a notice of call for redemption without any intention of paying in accordance with the terms of the bond. Nor does the Court attempt to say what the rights of a holder of a bond called for redemption would be if the United States refused to pay, or refused to pay in gold. As a matter of fact, the Court evidently had some doubt in its mind as to whether or not a bondholder could maintain a suit against the United States in the event of non-payment after the issuance of a notice of call for redemption as now contended by our opponents. The Court said:

> "It may be admitted, *for the sake of argument—although the proposition cannot be considered indisputable*—that, after the maturity of a call for the redemption of designated bonds, the obligation of the government to pay them thereby became fixed and irrevocable, so that thereafter, on demand and re-

fusal of payment, an action would accrue to the holder for the recovery of the principal and accrued interest, the Court of Claims having jurisdiction in such cases." (113 U. S. 498.)

The passage quoted clearly indicates that the Court was not in any way passing on the question here involved. The fact is, that the United States were ready and willing to pay the bonds involved in the *Morgan* case on the redemption date. Clearly, that case does not support the proposition contended for by the government.

After all, the language of these bonds as to the payment of interest is not so ambiguous that each word or each phrase must be minutely examined in order to ascertain its meaning. The intention of the parties is entirely clear. Each bondholder was lending his government money which was to be repaid to him. In the meantime he was to receive interest for the use of his money. In order that he might be protected against loss occasioned by a depreciation in the currency, the bond was made payable in gold. The United States were to have the right to pay the bonds before maturity and thereby relieve themselves of the obligation to pay interest. Accordingly, the bonds were made redeemable at the option of the United States. The clear intent was that interest was to be paid so long as the United States had the use of the bondholders' money but was to cease as soon as the United States were ready to repay the loan. In other words, interest was to cease when payment was tendered. The government's arguments to the contrary are, we submit, entirely without merit.

We respectfully submit, therefore, that inasmuch as payment in gold coin was a condition to the exercise of the right of redemption, the failure of the United States

to pay in gold coin was a failure to redeem the respondent's bond on June 15, 1935. Consequently, the interest coupon sued on is a subsisting obligation of the United States and the respondent is entitled to judgment for the face amount thereof.

D.

The Question of Whether or Not the Respondent Would Sustain Any Damage by Reason of the Refusal of the United States to Pay the Bond in Gold Coin Is Entirely Immaterial.

The government's brief is replete with statements to the effect that the respondent in this case has sustained and can sustain no damage whatsoever by reason of the refusal of the United States to pay his bond in gold coin on the date of redemption. Over and over again the statement is made that the United States has tendered to the respondent "substantial performance" of its obligation to pay the bond in gold coin and again and again it is said that the legal tender currency which the United States tendered to the respondent in payment of his bond was the "equivalent" of the gold coin which he was entitled to receive and that, therefore, he has no reason to complain. We do not at all concede that the respondent will not sustain any damage by payment in legal tender currency instead of in gold coin, nor that payment in legal tender currency is a substantial compliance with the obligation of the United States to pay in gold coin, nor that legal tender currency is in any sense the "equivalent" of gold coin. Nor do we understand that this Court in the *Perry* case has decided that legal tender currency is or was the equivalent of gold coin. These questions we will discuss later. But, at this point we wish to emphasize that even if it can be assumed that the legal tender currency is the equivalent of gold coin,

and that the payment of legal tender currency is a substantial compliance with the obligation to pay gold coin, and that the respondent has not and will not be damaged by the payment of his bond in legal tender currency instead of gold coin, nevertheless these questions are entirely immaterial and of no consequence in this case. The respondent bargained for payment in gold coin; if the United States wish to redeem his bond they must carry out that bargain.

The government argues that even if the gold clause could be construed as promising payment in gold coin, nevertheless that promise could be satisfied by the payment of the "equivalent" in value of the gold coin. They contend that a substantial performance of that promise is sufficient. If this were a suit to recover damages for failure to pay the principal obligation of the bond, such arguments might possibly have merit. But this is not a suit to recover damages for the failure of the United States to pay the principal of the bond in gold coin and such arguments, therefore, have no merit. It is true that the law in some cases will permit an obligor to recover on a contract even though he has not performed his contract to the letter and has only rendered substantial performance. In such cases the obligee is compensated for the failure of the obligor to render strict performance by an award of damages. This rule is one of necessity, because otherwise one who had substantially performed his promise, could recover nothing from the promisee if he failed in some minute particulars to render complete performance. In such cases the promisee would be substantially benefited at the expense of the promisor.

See 3 *Williston on Contracts* (1936), p. 2365, §843.

But this situation does not exist in the present case. The rule of substantial performance applies only in cases where the performance has already been rendered and where it would be unjust to deprive the promisor of all compensation for the performance rendered by him. It does not apply in cases where there is merely a *tender* of performance as there is in the present case. In such cases the necessity which gives rise to the rule of substantial performance does not exist.

The refusal to permit the promisor to tender substantial performance only, would not operate unjustly and would not benefit the promisee at his expense. Where the contract is executory, a tender of substantial performance is insufficient.

We have already pointed out that in cases such as this nothing short of a strict performance will suffice (supra pp. 25-30). Therefore we need not inquire whether or not the respondent will be damaged by a failure to render a strict performance. We need not concern ourselves with the question as to whether or not the performance tendered is just as valuable as the performance contracted for. The respondent has an absolute right to refuse to accept a substitute for the thing he contracted for. He is not obliged to accept something "just as good".

We respectfully submit that if the United States wished to redeem the respondent's bond, they could do so only after a strict compliance with the conditions attached to that right of redemption. *The only* question to be determined is whether or not there has been a strict compliance. The question as to whether or not the respondent would be damaged by the acceptance of something less than strict performance has no relevance whatsoever.

III.

REGARDLESS OF WHETHER THE RESPONDENT'S BOND BE CONSTRUED AS A "GOLD COIN" CONTRACT OR AS A "GOLD VALUE" CONTRACT, PAYMENT OF THE PRINCIPAL, DOLLAR FOR DOLLAR, IN LEGAL TENDER CURRENCY, WOULD NOT BE A FULFILLMENT OF THE OBLIGATION.

In the *Perry* case the government argued at great length that the gold clause in United States bonds was not a "gold value" contract but was a "gold coin" contract. They now argue, just as vigorously, that the contract is not a "gold coin" contract at all but is a "gold value" contract. It seems to us clear that it is a "gold coin" contract, but whether it be considered one or the other makes no real difference in this case because in either event payment of the principal of the bond, dollar for dollar, in legal tender currency would be a breach of the obligation.

A.

Payment in Gold Coin Is Required.

The government complains that the respondent made no argument in the lower Court in support of his assertion that the contract was a "gold coin" contract and that payment of the principal in gold coin and not in legal tender currency was required. In this they are correct. No argument was necessary. The government did not assert the contrary, but likewise conceded that the contract was a "gold coin" contract. The contention is now made for the first time that the gold clause is a "gold value" as contrasted with a "gold coin" contract.

It seems to us, however, that the contract itself is so clear on this point as to need no argument. It provides that the principal and interest "shall be payable in

United States gold coin of the present standard of value". What could be clearer? The bond does not provide for payment in "gold coin or its equivalent"; it provides simply and only for payment in *gold coin.* Such contracts have always been sustained by this Court as valid contracts for the payment of a particular kind of money.

Thus, in *Bronson v. Rodes,* 7 Wall. 229, a bond provided for payment in gold and silver coin of the United States. The Court held that the contract was valid and that it was a contract for the payment of a certain amount in gold coin of a definite standard and could not be satisfied by the tender of a different kind of money. It was held that contracts to pay coin dollars can only be satisfied by the payment of coin dollars, and that a judgment on such a contract should be a judgment for coin dollars and not a judgment for an equivalent amount in currency. The same result was reached in *Butler v. Horwitz,* 7 Wall. 258; *Dewing v. Sears,* 11 Wall. 379; *Trebilcock v. Wilson,* 12 Wall. 687; *The Emily Souder,* 17 Wall. 666; *Thompson v. Butler,* 95 U. S. 694.

It is true that in *Gregory v. Morris,* 96 U. S. 619, which is cited by the government, the Court affirmed a judgment for an amount in currency equivalent to a specified amount in gold coin. In that case certain cattle had been pledged as security for the repayment of a certain sum in gold. The money was not repaid and the pledgee took possession of the cattle. The pledgor then replevied the cattle and posted bond to indemnify the pledgee against any damage which might be sustained by him as a result of the taking of the cattle. The case was tried *on the question of the right* of possession and the damage sustained by the pledgee. The Court pointed out

that although the original obligation was payable in gold coin, nevertheless the question at issue in the case was the amount of damage sustained by the pledgee by reason of the unlawful taking of the property by the pledgor. In other words, the suit was not directly on the original obligation to pay in gold coin. Even then the Court was careful to point out that the plaintiff was satisfied to take a judgment for an amount of legal tender currency equivalent to the gold coin, and indicated rather clearly that had he objected, he would probably have been entitled to a judgment for the amount due him in gold coin.

Prior to the decision of this Court in the *Perry* case there can certainly not be the slightest doubt but that this Court has uniformly and consistently held that contracts such as that involved in the present case are "gold coin" contracts as contrasted with "gold value" contracts.

But the government contends that this Court in the *Perry* case overruled the clear holding of the previous cases and decided that the contract in the *Perry* case was a "gold value" and not a "gold coin" contract. It seems to us clear that this was not the decision in the *Perry* case. In the first place, in view of the long line of authorities directly to the contrary, this Court would have been very slow to reach such a conclusion, and had it reached such a conclusion, it would have definitely stated that the prior decisions were overruled. It is to be observed, however, that although this Court referred to the earlier cases in both the *Perry* case and in *Norman v. B. & O. Railroad*, 294 U. S. 240, the earlier cases were not overruled. The Court merely pointed out that the situation at the time those cases were decided was different from

that existing now because when the earlier cases were decided, gold coin was in circulation, whereas, now no gold coin is in circulation. Now, obviously that distinction, while it might have some importance in determining the legal operation and effect of the gold clause at the present time, can have no effect in construing that clause, that is, in ascertaining the meaning of the parties, because at the time the bonds in this case were issued, gold coin was still in circulation and the situation then was exactly the same as it was at the time of the decisions in the earlier gold cases.

This Court was very careful to avoid any implication that it was overruling the decision in *Bronson v. Rodes,* and the other early gold cases. The majority opinion in the *Perry* case certainly did not state that the gold clause in the bond was a "gold value" contract and not a "gold coin" contract. Nor does the language quoted by the government in its brief lend itself to that interpretation.

But even if there should be any uncertainty as to the exact meaning of the language appearing in the opinion, certainly the decision of the Court leaves no room for doubt concerning its interpretation of the gold clauses.

The government argues that the clause should be construed as though it read "payable in gold coin or its equivalent". It is contended that the government had the option to pay either gold coin or to pay the equivalent of gold coin in legal tender currency and that this Court in the *Perry* case decided that the legal tender currency was the equivalent of gold coin. But if this were true, then certainly this Court could not have held that the Joint Resolution of June 5, 1933, was invalid as applied to obligations of the United States. If it could be

said that the United States had the option to pay either gold coin, or its equivalent in legal tender currency, and that the legal tender currency was, dollar for dollar, the equivalent of gold coin, then certainly Congress would not be exceeding its power by exercising this option and declaring in the Joint Resolution that gold coin should not be paid and that legal tender currency only should be paid. It would be doing that which it had a perfect right to do. If it had a right to pay the equivalent rather than the gold, then it could certainly elect to pay in legal tender currency. That is all the Joint Resolution purported to do. This would not be overriding the obligation of the bond, it would be performing the obligation of the bond. And yet this Court held that the Joint Resolution as applied to bonds of the United States, was invalid.

The truth is that this Court did not say that the gold clause was a "gold value" contract nor did it hold that a devalued paper dollar was the equivalent of the gold dollar required to be paid. It held only that there was no proof that Perry had sustained damage by reason of the failure of the United States to pay him gold coin.

B.

Even if It Be Assumed That the Gold Clause Is a "Gold Value" Contract, the Burden Is Upon the Government to Prove That It Has Tendered the Equivalent of the Gold Coin, and This It Has Not Done.

In many places in its brief the government assumes that the burden is upon the respondent to establish the fact that he has suffered damage and that the legal tender currency tendered to him is not the equivalent of the gold coin to which he was entitled. As we have

above pointed out this question has no relevancy but even if we assume that the obligation could be satisfied by the payment of an amount in legal tender currency equivalent to the gold coin to which the respondent was entitled, the burden of proof is upon the government to show that the amount it has tendered is the equivalent of the gold coin, and not upon the respondent to show that the amount tendered is not the equivalent of the gold coin.

As pointed out previously, the government in this case is in effect pleading a confession and avoidance; it is setting up an affirmative defense to the claim of the respondent. It is elementary that in such cases the burden is upon him who offers the affirmative defense to establish it, and not upon the plaintiff to disprove it. This is particularly true in cases where the affirmative defense is a plea of tender. It is then incumbent upon the one alleging the tender to prove not only that a tender was made, but that a tender of the exact amount due, in the medium of payment called for by the contract, was made. The same is true in cases where payment is pleaded. He who alleges payment must prove that he has paid the obligation and prove that he has paid the full amount which was due.

See:

Simonton v. Winter, 5 Pet. 141
Wallace v. McConnell, 13 Pet. 136
Robinson v. Smith, 92 So. 546 (Ala.)
North Pennsylvania R. R. Co. v. Adams, 54 Pa. 94
Davis v. Nelson's Estate, 73 Vt. 328
Tuthill v. Morris, 81 N. Y. 94
United States Wringer Co. v. Cooney, 73 N. E. 803 (Ill.)
Burton's Ex'r. v. Manson, 129 S. E. 356 (Va.)

Mercer Electric Mfg. Co. v. Connecticut Electric Mfg. Co., 89 Atl. 909 (Conn.)
Jones on Evidence, 2nd Ed., Vol. 2, pp. 851, 866, §§479, 486
48 C. J. 680, Tit. "Payment", §176
62 C. J. 698, Tit. "Tender", §101

Now, in the present case, the government avers that it has tendered to the respondent an amount in legal tender currency equivalent to the gold coin to which he was entitled. It is, therefore, incumbent upon the government to prove that the amount tendered in legal tender currency *was* the equivalent of the gold coin contracted for. But this the government does not do. It *avers* and *argues* that the legal tender currency was the equivalent of the gold coin, but it does not *prove* that it was. On the contrary, the government argues that the burden is upon the respondent to prove that it is not the equivalent.

It is said that this Court in the *Perry* case has decided that the legal tender currency was the equivalent of the gold coin. But this is not correct. This Court expressly refrained from so deciding. It did decide that in that case there was no evidence that the legal tender *currency was not the equivalent of the gold* coin and that since the burden of proof in that case was on the plaintiff to establish that fact, he failed to recover. *But the situation* is just the reverse in the present case. Here the burden is upon the government and it has not offered any evidence to *support its allegation* that the *legal tender currency is the equivalent of the gold coin.*

The government argues that the respondent, if he had been paid gold coin, would have been obliged to surrender it immediately to the United States and ac-

cept an equal amount of legal tender currency therefor, and that consequently the two must be taken to be equivalent. But this is merely begging the question. If it be true that the gold coin could be paid and then immediately retaken and legal tender currency substituted, obviously the net result of the transaction is a payment in legal tender currency. It could not be considered a payment of gold coin at all. In addition it does not seem at all clear to us that the government is correct in assuming that having once paid the gold coin the United States could appropriate it by paying an equal amount of legal tender currency. This assumption is based upon the premise that the gold coin and the legal tender currency are equivalent. But there is no proof of this fact and if the two should not be equivalent then the whole argument falls. It is also true that under the regulations issued pursuant to the Gold Reserve Act of 1934, the Secretary of the Treasury has been buying gold and paying $35.00 per ounce for it. *In June, 1935, this included not* only newly mined gold but also gold bullion and gold coins imported from abroad. In other words it included all gold lawfully in the possession of the holder, that is, all gold which had not been withdrawn from circulation before the devaluation of gold. Why would it not also include gold coins which had been lawfully delivered to the respondent in payment of his bond? If so, it would appear that the equivalent of the gold coin to which the respondent was entitled was much more than the legal tender currency tendered to him.

We submit, therefore, that it can not be assumed that legal tender currency is, dollar for dollar, the equivalent of gold coin and that the burden of proving that fact rests on the government.

IV.

THE JOINT RESOLUTION OF JUNE 5, 1933, WAS UNCONSTITUTIONAL INSOFAR AS IT ATTEMPTED TO OVERRIDE THE OBLIGATION CREATED BY LIBERTY LOAN BONDS.

In its decision in the *Perry* case, this Court very definitely held that the Joint Resolution of June 5, 1933, was invalid in so far as it attempted to abrogate the gold clause in obligations of the United States. In the opinion of Mr. Chief Justice Hughes, concurred in by the majority of the Court, it was said:

> "We conclude that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power." (294 U. S. 354).

In spite of this very clear and positive declaration concerning the invalidity of the Joint Resolution of June 5, 1933, the government contends (brief pp. 87-102) that the Joint Resolution is not invalid as applied to Liberty Bonds. Three reasons are advanced for this contention. First, that the passage quoted above stated the views of only four members of the Court and, therefore, does not have the force of precedent. Second, that the conclusion quoted was not necessary to the decision in the *Perry* case and, therefore, does not have the force of precedent. And, third, that this Court construed the gold clause to be a "gold value" contract and that consequently the Joint Resolution could not have been invalid because in that view of the case it did not infringe on the obligation expressed in the bond.

It seems to us that in making these contentions the government is attempting to re-argue questions which were finally and definitely settled by the decision in the

Perry case. We do not propose in this case to re-argue those questions. We do wish, however, to point out the complete fallacy of the observations made by the government concerning the decision in the *Perry* case.

In the first place, the statement that the decision was concurred in by only four Justices is incorrect. At least eight of the Justices concurred in holding the Joint Resolution of June 5, 1933, invalid as applied to obligations of the United States. Not only did the Chief Justice and the three Associate Justices who concurred in his opinion hold that the Joint Resolution was invalid, but also Mr. Justice McReynolds and the three Associate Justices who concurred with him very definitely stated their opinion that the Joint Resolution was invalid. The only difference between the two opinions on this point was that in the opinion of the Chief Justice and the Associate Justices who concurred with him, the Joint Resolution was valid as applied to private obligations and invalid as applied to obligations of the United States, whereas, in the opinion of Mr. Justice McReynolds and the three Associte Justices who concurred with him, the Joint Resolution was invalid as applied to both private obligations and obligations of the United States. It is true that Mr. Justice Stone did not go quite that far, but he also said that the Joint Resolution constituted a repudiation of the obligation contained in the bonds. He felt that the government, through the exercise of its power to regulate the currency, had rendered itself immune from *liability* for its repudiation. He expressly refrained from indicating whether or not the obligation of the United States on its gold clause bonds was any greater or any different than the obligation of private persons or corporations on their gold clause bonds. It is, therefore, absurd for the gov-

ernment to contend that the decision of this Court holding the Joint Resolution of June 5, 1933, invalid in so far as it attempted to override the obligations of the United States, has no force as precedent.

The government also urges that the decision in the *Perry* case does not have the binding force of precedent because it was not necessary to the conclusion finally reached. We must confess that we do not follow the reasoning of the government on this point. It seems to us clear that the decision on the question of the validity of the Joint Resolution as applied to obligations of the United States was very essential to the determination of the question presented to the Court in that case. If the Court had been of the opinion that the Joint Resolution as applied to United States obligations had the same effect as when applied to private obligations, it would have been entirely unnecessary for the Court to discuss the question as to whether or not Perry had sustained damage. *The decision in the Perry* case would, in such event, have been the same as that in the *Norman* case. If the Joint Resolution had been valid as applied to government obligations, then no question could have arisen as to whether or not the government had breached its obligation. The gold clause would have been wiped out just as completely as it was in the *Norman* case. It seems to us, therefore, that the decision in the *Perry* case to the effect that the Joint Resolution was invalid as applied to obligations of the United States, was not only necessary to the conclusion reached but it was of the very essence of the decision in that case. There cannot be the slightest question about this.

And finally the government contends that this Court in the *Norman* and *Perry* cases held the gold clauses to be

"gold value" contracts and that, since in that view of the undertaking the Joint Resolution could not have been an infringement of the obligation of the bonds, it cannot be assumed that this Court held that it was such an infringement. But such tenuous reasoning as this gets us nowhere. All the government is attempting to do is to reargue the question definitely decided by this Court. The same authorities are cited and the same arguments are advanced as were cited and advanced to this Court in the course of the argument of the *Perry* case. The point is that this Court felt that such arguments had no merit and it did hold the Joint Resolution invalid as applied to obligations of the United States. Nothing can be gained by re-arguing that question. And it is foolish to contend that because that decision does not meet with the approval of the government, it, therefore, must not be understood to mean what it says. We have already shown (supra, pp. 61-65) that the gold clause was a "gold coin" contract and not a "gold value" contract. But in determining whether or not the Joint Resolution as applied to government obligations is invalid, it makes no difference whether the clause be considered as a "gold coin" clause or a "gold value" clause. If it was a "gold coin" clause, as the government in its argument in the *Perry* case contended, then the Joint Resolution was invalid because it undertook to repudiate the obligation to pay gold coin. If it was a "gold value" clause, as the government now contends, then the Joint Resolution was invalid because it undertook to substitute for the "gold value," legal tender currency in an amount which was arbitrarily fixed without regard to whether or not it represented the "gold value" contracted for, and hence constituted a repudiation of the obligation to pay "gold value".

The Joint Resolution of June 5, 1933, represented a deliberate attempt to repudiate the obligation of the United States as expressed in the gold bonds which had been issued. There was no attempt to disguise the repudiation and call it something else. In its argument in the *Perry* case the government did not contend that there was no repudiation; on the contrary, it attempted to justify that repudiation on the ground that it was an act taken in exercise of the sovereign power to control and manage the currency. This contention was definitely rejected by this Court. Only one member of the Court concurred in the view of the government that through the exercise of its power to regulate the value of money it could render itself immune from liability for the repudiation of its undertaking. The other eight Justices concurred in the view that Congress could not, in the exercise of its power to regulate the currency, repudiate the solemn obligations of the United States. And it should be noted that in so holding the Court did not question the power of Congress to regulate the currency. As stated by Mr. Chief Justice Hughes:

> "There is no question as to the power of the Congress to regulate the value of money, that is, to establish a monetary system and thus to determine the currency of the country. The question is whether the Congress can use that power so as to invalidate the terms of the obligations which the government has theretofore issued in the exercise of the power to borrow money on the credit of the United States." (294 U. S. 350.)

And as stated by Mr. Justice McReynolds:

> "There is no challenge here of the power of Congress to adopt such proper 'monetary policy' as it may deem necessary in order to provide for national

obligations and furnish an adequate medium of exchange for public use." (294 U. S. 369.)

"Congress may coin money; also it may borrow money. Neither power may be exercised so as to destroy the other; the two clauses must be so construed as to give effect to each. Valid contracts to repay money borrowed cannot be destroyed by exercising power under the coinage provision." (294 U. S. 377.)

Likewise, as we have stated several times before, we are not in this case challenging the power of Congress to regulate the currency. The government devotes a large portion of its brief to an exposition and discussion of that power. We admit that Congress has the power to regulate the currency. We admit that in the exercise of that power Congress may withdraw gold from circulation. We admit that Congress may refuse to pay the respondent's bond in gold coin. All discussion of those questions is simply beside the point. Conceding the power of Congress to forbid the payment of gold, the question is, having thus made it impossible to perform their obligation to pay the gold coin, can the United States exercise their option to redeem their gold bonds? That is the only question presented in this case. It is an issue which the government attempts to avoid by discussing many other irrelevant questions.

CONCLUSION.

We have not undertaken in this brief to press the points made by the respective petitioners in *Smyth v. United States,* No. 42, Oct. Term, 1937, and *Dixie Terminal Corporation v. United States,* No. 43 Oct. Term, 1937, to the effect that the bonds in question could not be called for redemption except by an Act of Congress ex-

ercising the right of redemption, and that in view of U.S.C., Tit. 31, §731, the bonds in question could not be redeemed at all in June, 1935. While we believe there is substantial merit in each of these contentions, nevertheless, a decision based on either contention would leave open the far more important question presented by this case. A decision on that question by this Court is essential because, although the amount directly involved in this suit is very small, the principles involved are of great importance.

We ask only that the government be required to adhere strictly to the terms of its obligation and not be permitted to repudiate its promise. The promise to pay interest until maturity or prior redemption is clear. And no plentitude of words can alter the fact that without payment in gold coin there could be no redemption.

We do not deny that the respondent's bond was subject to redemption but we do most earnestly contend that the right of redemption depended upon the giving of a *bona fide* notice of redemption and actual redemption by payment in gold coin. Neither condition has been complied with and the coupon sued on is still a valid subsisting obligation of the United States which should be paid.

We respectfully submit, therefore, that the judgment of the Circuit Court of Appeals should be affirmed so that a judgment for the respondent in the amount of $17.50 may be entered.

Respectfully submitted,

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Attorneys for Respondent.

Cardozo J. p. 5, 10.
Stone J. p. 2,

SUPREME COURT OF THE UNITED STATES.

Nos. 42, 43 and 198.—October Term, 1937.

James D. Smyth, Executor of the Estate of James J. Ransom, deceased, Petitioner, 42 *vs.* The United States.	On Writ of Certiorari to the Court of Claims.
The Dixie Terminal Company, Petitioner, 43 *vs.* The United States.	On Writ of Certiorari to the Court of Claims.
The United States of America, Petitioner, 198 *vs.* Arthur W. Machen.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 13, 1937.]

Mr. Justice Cardozo delivered the opinion of the Court.

Three cases present a single question: Was a notice of call issued by the Secretary of the Treasury for the redemption of Liberty Loan bonds effective to terminate the running of interest on the bonds from the designated redemption date?

Petitioner in No. 42 is the owner of a $10,000 First Liberty Loan 3½% bond of 1932-1947, serial number 6670. The bond was issued pursuant to the Act of April 24, 1917 (40 Stat. 35), and Treasury Department Circular No. 78, dated May 14, 1917, and was purchased by petitioner in December, 1934, for $10,362.50 and accrued interest. Its provisions, so far as material, read as follows:

"The United States of America for value received promises to pay to the bearer the sum of Ten Thousand Dollars on the 15th day of June, 1947, with interest at the rate of three and one-half per centum per annum payable semi-annually on December 15 and June 15 in each year until the principal hereof shall be payable, upon presentation and surrender of the interest coupons hereto attached as they severally mature. The principal and interest of this bond shall be payable in United States gold coin of the present

standard of value, . . . All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, or on any semi-annual interest payment date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date, and published thereafter from time to time during said three months period as the Secretary of the Treasury shall direct. . . . From the date of redemption designated in any such notice interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void. . . ."

On March 14, 1935, the Secretary of the Treasury published a notice of call for the redemption on June 15, 1935, of all the bonds so issued. "Public notice is hereby given:

1. All outstanding First Liberty Loan bonds of 1932-47 are hereby called for redemption on June 15, 1935. The various issues of First Liberty Loan bonds (all of which are included in this call) are as follows:

First Liberty Loan 3½ percent bonds of 1932-47 (First 3½'s), dated June 15, 1917; . . .

2. Interest on all such outstanding First Liberty Loan bonds will cease on said redemption date, June 15, 1935."

Thereafter, on April 22, 1935, the Secretary of the Treasury issued a circular (Department Circular, No. 535) prescribing rules for the redemption of First Liberty Loan bonds, and providing, among other things, as follows: "Holders of any outstanding First Liberty Loan bonds will be entitled to have such bonds redeemed and paid at par on June 15, 1935, with interest in full to that date. After June 15, 1935, interest will not accrue on any First Liberty Loan bonds."

Nearly two years before the publication of the notice of call Congress had adopted the Joint Resolution of June 5, 1933 (48 Stat. 112) by which every obligation purporting to be payable in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby was to be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment was legal tender for public and private debts. Nearly four weeks before the publication of the notice of call, the validity of that Joint Resolution had been the subject of adjudication by this court in the Gold Clause Cases, *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U. S. 240, *Nortz* v. *United*

States, 294 U. S. 317, and *Perry* v. *United States,* 294 U. S. 330, all decided February 18, 1935. We may presume that the call was issued with knowledge of those rulings.

About six months after the date designated for redemption, petitioner, on December 28, 1935, presented his bond (with coupons due on and before June 15, 1935, detached) to the Treasurer of the United States, and demanded the redemption by the payment of 10,000 gold dollars each containing 25.8 grains of gold nine-tenths fine, which was the gold content of a dollar in 1917. The Treasurer refused to comply with that demand, but offered payment of the face amount of the principal in legal tender coin or currency other than gold or gold certificates. Petitioner declined to accept the tender and retained the bond. Thereafter, on the same day, petitioner presented to the Treasurer of the United States, the interest coupon for the six-months period June 15 to December 15, 1935, and demanded payment either in gold coin or legal tender currency. The Treasurer refused payment on the ground that the bond to which the coupon was attached had been called for redemption on June 15, 1935.

An action followed in the Court of Claims, petitioner resting his claim upon the interest coupon only, and limiting his demand to a recovery in current dollars.[1] The Court gave judgment for the United States on the ground that on the designated redemption date, all coupons for later interest became void. Because of the important interests, public and private, affected by the judgment, a writ of certiorari was granted by this court.

Petitioner in No. 43 is the owner of a $50 Fourth Liberty Loan 4½% bond of 1933-1938, which it bought on March 9, 1935. The bond was issued pursuant to the Act of September 24, 1917 (40 Stat. 288) as amended, and Treasury Department Circular, No. 121. It was to mature on October 15, 1938, subject, however, to redemption on October 15, 1933 or later. The terms of redemption are stated in Circular No. 121, which is incorporated by reference

[1] The Joint Resolution of Aug. 27, 1935 (49 Stat. 938, 939), withdrawing the consent of the United States to suit where the claimant asserted against it a right, privilege or power "upon any gold clause securities of the United States or for interest thereon" makes an exception of any suit begun by January 1, 1936, as well as any proceeding "in which no claim is made for payment or credit in an amount in excess of the face or nominal value in dollars of the securities, coins or currencies of the United States involved in such proceeding." Petitioner has brought himself within each branch of the exception.

into the bond itself. Six months notice by the Secretary of the Treasury was required. "From the date of redemption designated in any such notice, interest on bonds called for redemption shall cease." On October 12, 1933, the Secretary of the Treasury published a notice of call for redemption on April 15, 1934, of certain bonds of this issue. The bond now owned by petitioner is one of them. There were tenders and refusals similar to those described already in the statement of the other cases. An action followed in the Court of Claims. Petitioner prayed for judgment in the sum of $1.07, the amount of the interest coupon for the six months period ending October 15, 1934.[2] The court dismissed the claim, and the case is here on certiorari.

Respondent in No. 198 is the owner of a $1,000 First Liberty Loan 3½% bond of 1932-1947, No. 47084, purchased on March 22, 1933, for $1,011.25. This is the same bond issue involved and described in No. 42. Respondent did not present his bond for payment either on the redemption date or later. He did not present the coupon which is the foundation of the suit. However, the fact is stipulated that the Treasurer of the United States and other fiscal agents have not at any time been directed by the Secretary of the Treasury to redeem the bonds in gold coin, but have been authorized and directed to redeem in legal tender currency. The fact is also stipulated that there was a refusal to pay similar coupons for interest accruing after the date of redemption. Respondent brought suit upon his coupon in the United States District Court for the District of Maryland. The District Court gave judgment in favor of the United States. The Court of Appeals for the Fourth Circuit reversed and ordered a new trial (87 F. (2d) 594), declining to follow the ruling which had been made by the Court of Claims. The case is here on certiorari on the petition of the Government.

Hereafter, for convenience of reference, the bondholder in each of the three cases will be spoken of as a "petitioner", without adverting to the fact that in one of them (No. 198) he is actually a respondent.

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[2] The coupon reads as follows: "The United States of America will pay to bearer on October 15, 1934, at the Treasury Department, Washington, or at a designated agency, $1.07, being six months' interest then due on $50 Fourth Liberty Loan 4¼% Gold Bonds of 1933-1938 unless called for previous redemption".

First: The so-called redemption provisions of the bonds are provisions for the acceleration of maturity at the pleasure of the Government, and upon publication of the notice of call for the period stated in the bonds the new date became substituted for the old one as if there from the beginning.

The contract is explicit. "From the date of redemption designated in any such notice interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void." The contract is not to the effect that interest shall cease upon or after payment. Cf. *Sterling* v. *H. F. Watson Co.*, 241 Pa. 135, 140. The contract is that interest shall cease upon the date "designated" for payment. The rule is established that in the absence of contract or statute evincing a contrary intention, interest does not run upon claims against the Government even though there has been default in the payment of the principal. *Angarica* v. *Bayard*, 127 U. S. 251; *United States* v. *North Carolina*, 136 U. S. 211; *United States* v. *North American Co.*, 253 U. S. 330, 336; *Seaboard Airline Ry.* v. *United States*, 261 U. S. 299, 304. The allowance of interest in eminent domain cases is only an apparent exception, which has its origin in the Constitution. *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497; *United States* v. *Rogers*, 255 U. S. 163, 169. If the bonds in suit had matured at the date of natural expiration, interest would automatically have ended, whether the bonds were paid or not. Maturity at a different and accelerated date does not make the obligation greater. In the one case as in the other the interest obligation ends, and this for the simple reason that the contract says that it shall end. Upon non-payment of principal at the ~~accelerated~~ maturity, the bondholder, if unpaid, has a remedy by suit to recover principal, with interest then overdue, but not interest thereafter. Upon non-payment of principal at the accelerated date, he has a like remedy, but no other. Default, if there has been any, is as ineffective in one situation as in the other to keep interest alive.

Petitioners insist, however, that the notices of call were not adequate to accelerate maturity, with the result that interest continued as if notice had not been given. This surely is not so if we look to form alone and put extrinsic facts aside. "All outstanding First Liberty Loan bonds of 1932-47 are hereby called for redemption on June 15, 1935". "All outstanding Fourth Liberty Loan 4¼

per cent bonds of 1933-38, hereinafter referred to as Fourth 4¼'s, bearing the serial numbers which have been determined by lot in the manner prescribed by the Secretary of the Treasury, are called for redemption on April 15, 1934, as follows", (the serial numbers being thereupon stated). Nothing could be simpler, nothing more clearly adequate, unless the notices are to be supplemented by resort to extrinsic facts, the subject of judicial notice, which neutralize their terms. Petitioners maintain that such extrinsic facts exist. In their view, each of the two forms of notice must be read as if it incorporated within itself the Joint Resolution of June 5, 1933, and promised payment in the manner called for by that Resolution, and not in any other way. Thus supplemented, we are told, the notice is a nullity, for the payment that it promises is not the payment owing under the letter of the bond.

The notice of call for the redemption of the bonds was a notice, not a promise. The Secretary of the Treasury was not under a duty to make any promise as to the medium of payment. He did not undertake to make any. The obligation devolving upon the United States at the designated date was measured by the law, and the law includes the Constitution as well as statutes and resolutions. The medium of payment lawful at the time of issuing the call might be different from that prevailing at the accelerated maturity. This might happen as a consequence of an amendment of the statute. It might happen through judicial decisions adjudging a statute valid and equally through judicial decisions adjudging a statute void. The interval between notice and redemption was three months in the case of the First Liberty bonds; it was six months for the Fourth. The Secretary of the Treasury understood these possibilities when he sent out his notices for the redemption of the bonds in suit. Indeed, *Perry* v. *United States, supra,* had already been decided when bonds of the First Liberty issue were made the subject of his call. In each form of notice the implications of the call are clear. What the bondholders were told was neither more nor less than this, that at the accelerated maturity they would be entitled to payment in such form and in such measure as would discharge the obligation. The Secretary's beliefs or expectations as to what the proper form or measure would be at the appointed time are of no controlling importance, even if they were shown. The obligation was not his; it was that of the United States. His own beliefs and expectations and even those of the Government might be changed

or frustrated by subsequent events. The bondholders had the assurance that the bonds would be redeemed, and they were entitled to no other. Whatever medium of payment would discharge the obligation if maturity had been attained through the natural lapse of time would discharge it as completely at an accelerated maturity. The same money that would "pay" would serve also to "redeem". There is no reason to believe that the one situation was distinguished from the other in the minds of the contracting parties. The sum total of existing law—Constitution and statutes and even controlling decisions, if there were any—would say how much was due.

If this analysis is sound, it carries with it the conclusion that the call did not commit the Government either expressly or by indirection to a forbidden medium of payment. The case for the petitioners, if valid, must rest upon some other basis. A suggested basis is that the existence of the Joint Resolution amounted without more to an anticipatory breach, which made the notice of redemption void from its inception, if there was an election so to treat it, and this though the notice left the medium of payment open. But the rule of law is settled that the doctrine of anticipatory breach has in general no application to unilateral contracts, and particularly to such contracts for the payment of money only. *Roehm* v. *Horst*, 178 U. S. 1, 17; *Nichols* v. *Scranton Steel Co.*, 137 N. Y. 471, 487; *Kelly* v. *Security Mutual Life Ins. Co.*, 186 N. Y. 16; Williston, Contracts, rev. ed., vol. 5, sec. 1328; Restatement, Contracts, secs. 316, 318. Whatever exceptions have been recognized do not touch the case at hand. *New York Life Insurance Co.* v. *Viglas*, 297 U. S. 672, 679, 680. Moreover, an anticipatory breach, if it were made out, could have no effect upon the right of the complaining bondholders to postpone the time of payment to the date of natural maturity. The sole effect, if any, would be to clothe them with a privilege to declare payment overdue, which is precisely the result that they are seeking to avoid. The conclusion therefore follows that for the purpose of the present controversy the breach would be immaterial even if it were not unreal. But its unreality is the feature we prefer to dwell upon. The Government was not subject to a duty to keep the content of the dollar constant during the period intervening between promise and performance. The erroneous assumption of the existence of such a duty vitiates any argument in favor of the petitioners as to an anticipatory breach

just as it vitiates their argument as to the implications of the call. The duty of the Government and its only one was to pay the bonds when due. If the statutes had been amended before the date of redemption or if the courts had decided that payment must be made in gold or in currency proportioned to the earlier content of the dollar, there is little likelihood that any one would judge the efficacy of the notice by the test of the law in force at the date of its announcement.

The petitioners being dislodged from the position that the notices of call were void in their inception are perforce driven to the stand that they became nullities thereafter, when the statutes were unrepealed at the designated date. But at the designated date the accelerated maturity was already an accomplished fact. The duty of payment did not arise in advance of maturity. In the very nature of things it presupposes maturity as a preliminary condition. If there had been any different intention, the bonds would have provided that interest should cease upon payment or lawful tender, and not from the date of redemption stated in the call. This is not a case of mutual promises or covenants with performance to be rendered on each side at a given time and place. The obligees were not under a duty to do anything at all at the accelerated maturity, though they were privileged, if they pleased, to present the bonds for payment. Most of the learning as to dependent and independent promises in the law of bilateral contracts (*Loud* v. *Pomona Land and Water Co.*, 153 U. S. 564, 576) is thus beside the mark. This is a case of a unilateral contract where the only act of performance, the payment of the bonds, was one owing from the obligor, and arose by hypothesis upon maturity and not before. Let maturity, whether normal or accelerated, be accepted as a postulate, and it must follow that default in payment will not change the date again. If the Government were to come forward with a tender a day or a week after the designated date, the obligees would not be sustained in a rejection of the payment on the theory that the original date of maturity had been restored by the delay. If the obligees were to sue after the designated date, the Government would not be heard to say that because of the default in payment, the proposed acceleration was imperfect and inchoate. As pointed out already, the bondholders became entitled, when once the notice had been published, to a measure and medium of payment sufficient

to discharge the debts. If the then existing Acts of Congress were valid altogether, payment would be sufficient if made in the then prevailing currency. If the Acts were invalid, either wholly or in some degree, there might be need of something more, how much being dependent upon the operation of an implied obligation, read into the bonds by a process of construction, to render an equivalent. Whatever the form and measure, the bondholders had a remedy if they had chosen to invoke it.

We do not now determine the effect of a notice given in bad faith with a preconceived intention to withhold performance later. Fraud vitiates nearly every form of conduct affected by its taint, but fraud has not been proved and indeed has not been charged. There is no reason to doubt that a Secretary of the Treasury who was willing to give notice of redemption after knowledge of the decision in *Perry* v. *United States* understood that the obligation of the Government would be measured by the Constitution and not by any statute, in so far as the two might be found to be in conflict. Never for a moment was there less than complete submission to the supremacy of law. At the utmost, there was honest mistake as to rights and liabilities in a situation without precedent. Fraud being eliminated, the case acquires a new clarity. When we reach the heart of the matter, putting confusing verbiage aside and fixing our gaze upon essentials, the obligation of the bonds can be expressed in a simplifying paraphrase. "This bond shall be payable on June 15, 1947, or (upon three months notice by the Secretary of the Treasury) on June 15, 1932, or any interest date thereafter." That is what was meant. That in substance is what was said.[8]

No question of constitutional law is involved in the decision of these cases. No question is here as to the correctness of the decision in *Perry* v. *United States*, or as to the meaning or effect of the opinion there announced. All such inquiries are put aside as unnecessary to the solution of the problem now before us. Irrespective of the validity or invalidity of the whole or any part of

[8] Important differences exist, and are not to be ignored, between the retirement of shares of stock (Sterling *v.* H. F. Watson Co., *supra*; Corbett *v.* McClintic Marshall Corp., 17 Del. Ch. 165), and the accelerated payment of money obligations, and also between the acceleration of the obligations of the Government and those of other obligors. In the case of private obligations, a liability for interest survives the acceleration of the debt and continues until payment. In the case of Government obligations, interest does not continue after maturity (in the absence of statute or agreement) though payment is not made.

the legislation of recent years devaluing the dollar, the maturity of the bonds in suit was accelerated by valid notice. As a consequence of such acceleration the right to interest has gone.

Second: The Secretary of the Treasury did not act in excess of his lawful powers by issuing the calls without further authority from the Congress than was conferred by the statutes under which the bonds were issued.

The argument to the contrary is inconsistent with the plain provisions of the statutes and also of the bonds themselves.

There was also confirmation of his power in subsequent enactments. Victory Liberty Loan Act, sec. 6, 40 Stat. 1311, as amended, March 2, 1923, 42 Stat. 1427, and January 30, 1934, sec. 14 (b), 48 Stat. 344; Gold Reserve Act of 1934, sec. 14, 48 Stat. 342; Act of February 4, 1935, secs. 2, 4, 49 Stat. 20. 343

Third: In issuing the calls, the Secretary of the Treasury was not limited by the Act of March 18, 1869 (R. S. 3693; 16 Stat. 1) which in its day placed restrictions upon the redemption by the Government of interest-bearing bonds.

The aim of that statute was the protection of holders of United States obligations not bearing interest, the "greenbacks" of that era. "The bonds of the United States are not to be paid before maturity, while the noteholders are to be kept without their redemption, unless the noteholders are able at the same time to convert their notes into coin." Statement of Robert C. Schenck, one of the House Managers, Congressional Globe, March 3, 1869, p. 1879. Upon the resumption of specie payments in 1879 the aim of the statute was achieved, and its restrictions are no longer binding.

The judgments in Nos. 42 and 43 should be affirmed, and that in No. 198 reversed.

Ordered accordingly.

Dissenting: Mr. Justice McReynolds, Mr. Justice Sutherland and Mr. Justice Butler.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 42, 43 and 198.—October Term, 1937.

James D. Smyth, Executor of the Estate of James J. Ransom, deceased, Petitioner, *vs.* The United States.	On *Writ of* Certiorari to the Court of Claims.
42	
The Dixie Terminal Company, Petitioner, *vs.* The United States.	On Writ of Certiorari to the Court of Claims.
43	
The United States of America, Petitioner, *vs.* Arthur W. Machen.	On Writ of Certiorari to to the United States Circuit Court of Appeals for the Fourth Circuit.
198	

[December 13, 1937.]

Mr. Justice Stone.

I concur in the result.

I think the court below, in the *Machen* case, 87 Fed. (2d) 594, correctly interpreted the bonds involved in these cases as reserving to the government the privilege of accelerating their maturity by paying them or standing ready to pay them on any interest date according to their tenor, and upon giving the specified notice fixing the "date of redemption." The words "redeemed" and "redemption" as used in the bonds[1] point the way in which the privilege was to be exercised as plainly as when they are written in the bonds

[1] The redemption clause is as follows:

"The principal and interest of this bond shall be payable in United States gold coin of the present standard of value, . . . All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, or on any semi-annual interest payment date or ates, at the face value thereof and interest accrued at the date of redemption, o notice published at least three months prior to the redemption date, and published thereafter from time to time during said three months period as the Secretary of the Treasury shall direct. . . . From the date of redemption designated in any such notice interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void. . . ."

of a private lender. *Lynch* v. *United States,* 292 U. S. 571, 579; cf. *Perry* v. *United States,* 294 U. S. 330, 352. If payment, or readiness to pay the bonds in accordance with their terms was essential to "redemption," the one or the other, equally with the required notice, was a condition of acceleration.

The obligation of the bonds, read in the light of long established custom and of our own decision in *Holyoke Water Power Co.* v. *American Writing Paper Co.,* 300 U. S. 324, ~~326~~ 336, decided since the *Perry* case, must, I think, be taken to be a "gold value" undertaking to pay in gold dollars of the specified weight and fineness or their equivalent in lawful currency. Compare *Norman* v. *B. & O. R. Co.,* 294 U. S. 240, 302. *Feist* v. *Societe Intercommunale Belge D'Electricite,* L. R. [1934] C. C. 172, 173. The suppression of the use of gold as money, and the restriction on its export, and of its use in international exchange by acts of Congress, 48 Stat. 1, 337, did not relieve the government of its obligation to pay the stipulated gold value of the bonds in lawful currency. Hence it has not complied, or ever stood ready to comply, with one of the two conditions upon performance of which the bonds "may be redeemed and paid" in advance of their due date—the payment to the bondholder of the currency equivalent of the stipulated gold value.

It will not do to say that performance of this condition can be avoided or dispensed with by the adoption of any form of words in the notice. Nor can it be said that a declaration, in the notice, of intention to pay whatever can be collected in court, see the *Perry* case, *supra* 354, is equivalent to a notice of readiness to pay the currency equivalent of the gold value stipulated to be paid, or that a statement of purpose to pay what will constitutionally satisfy the debt suffices to accelerate although no payment of the currency equivalent is made or contemplated or is permitted by the statutes. It follows that judgment must go for the bondholders unless the Joint Resolution of Congress of June 5, 1933, 48 Stat. 112, requiring the discharge of all gold obligations "dollar for dollar" in lawful currency, and declaring void as against public policy all provisions of such obligations calling for gold payments, is to be pronounced constitutional.

Decision of the constitutional question being in my opinion now unavoidable, I am moved to state shortly my reasons for the view that government bonds do not stand on any different footing from

those of private individuals and that the Joint Resolution in the one case, as in the other, was a constitutional exercise of the power to regulate the value of money. Compare *Norman* v. *B. & O. R. Co., supra,* 304, 309. Without elaborating the point, it is enough for present purposes to say that the undertaking of the United States to pay its obligations in gold, if binding, operates to thwart the exercise of the constitutional power in the same manner and to the same degree *pro tanto* as do bonds issued by private individuals, *Norman* v *B. & O. R. Co., supra,* 311 *et seq.*, except insofar as the government resorts to its sovereign immunity from suit. Had the undertaking been given any force in the *Gold Clause Cases,* or the meaning which we have since attributed to it when used in private contracts, it would, if valid and but for the immunity from suit, have defeated the government policy of suspension of gold payments and devaluation of the dollar. Compare the *Norman* case, *supra,* with the concurring memorandum in *Perry* v. *United States, supra,* 360-361.

The very fact of the existence of such immunity, which admits of the creation of only such government obligations as are enforceable at the will of the sovereign, is persuasive that the power to borrow money "on the credit" of the United States cannot be taken to be a limitation of the power to regulate the value of money. Looking to the purposes for which that power is conferred upon the national government, its exercise, if justified at all, is as essential in the case of bonds of the national government as it is in the case of bonds of states, municipalities and private individuals. See *Norman* v. *B. & O. R. Co., supra,* 313 *et seq.* Its effect on the bondholders is the same in every case. Compare *Norman* v. *B. & O. R. Co., supra,* with *Nortz* v. *United States,* 294 U. S. 317. No reason of public policy or principle of construction of the instrument itself has ever been suggested, so far as I am aware, which would explain why the power to regulate the currency, which is not restricted by the Fifth Amendment in the case of any obligation, is controlled, in the case of government bonds, by the borrowing clause which imposes no obligation which the government is not free to discard at any time through its immunity from suit. I cannot say that the borrowing clause which is without force to compel the sovereign to pay nevertheless renders the government powerless to exercise the specifically granted authority to regulate the value of money with which payment is to be made.

SUPREME COURT OF THE UNITED STATES.

Nos. 42, 43 and 198.—October Term, 1937.

James D. Smyth, Executor of the Estate of James J. Ransom, deceased, *Petitioner*, 42 *vs.* The United States.	On Writ of Certiorari to the Court of Claims.
The Dixie Terminal Company, Petitioner, 43 *vs.* The United States.	On Writ of Certiorari to the Court of Claims.
The United States of America, Petitioner, 198 *vs.* Arthur W. Machen.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 13, 1937.]

Mr. Justice Black, concurring.

Agreeing altogether with the opinion of Mr. Justice Cardozo, which deals only with the construction of the contract and the rights flowing from the notice, I find it unnecessary and therefore inappropriate to express any opinion as to the validity of the Joint Resolution of 1933 or other acts of legislation devaluing the dollar.

SUPREME COURT OF THE UNITED STATES.

No. 198.—October Term, 1937.

The United States of America, Petitioner, v. Arthur W. Machen.	Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 13, 1937.]

Mr. Justice McReynolds, dissenting.

Mr. Justice Sutherland, Mr. Justice Butler and I cannot acquiesce in the conclusion approved by the majority of the Court. In our view it gives effect to an act of bad faith and upholds patent repudiation. Its wrongfulness is betokened by the circumlocution presented in defense.

The suit is to recover in currency of today the face value of a past due coupon originally attached to a three and one-half per cent bond of the United States issued in 1917 and payable 1947—nothing else.

The opinion of the Circuit Court of Appeals, to which little can be added, sets out the important facts and adequately supports its judgment.

In 1917, when gold coins contained 25.8 grains to the dollar, the United States obtained needed funds by selling coupon bonds—among them the one here involved. They solemnly agreed to pay the holder one thousand dollars on June 15, 1947, with semi-annual interest, in "gold coin of the present standard of value" subject to the following option:—"All or any of the bonds of the series of which this is one may be redeemed[1] and paid at the pleasure of the United States on or after June 15, 1932, on any semi-annual interest payment date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date. . . . From the date

[1] Redeem—5. To buy off, take up or remove the obligation of, by payment or rendering of some consideration; as to redeem bank notes with coin. *Webster's New International Dictionary.*

of redemption designated in any such notice, interest on the bonds called for redemption shall cease, and all coupons thereon maturing *after such date* shall be void."

The promise is to pay one thousand dollars in gold coin, 1917 standard. The face value of the bond is one thousand gold dollars. The option reserved is *to redeem and pay after notice* by giving the holder that number of such dollars. The notice required is nothing less than a declaration of *bona fide* purpose to redeem or pay off the obligation as written—no other right was reserved. A notice divorced from that purpose could amount to nothing more than a dishonest effort to defeat the contract and defraud the creditor. It would not come within the fair intendment of the contract; would not, in truth, designate a "date of redemption"; and, therefore, could not hasten the maturity of the principal or cause interest to cease. All this seems obvious, if respect is to be accorded to the ordinary rules of construction and principles of law governing contracts.

The obligation of the bond was declared by this Court in *Perry v. United States,* 294 U. S. 330, 351, 353, 354, to be a pledge of the credit of the United States and an assurance of payment as stipulated which Congress had no power to withdraw or ignore. "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." "The power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers" was there denied. "The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations. The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and, despite infirmities of procedure, remain binding upon the conscience of the sovereign."

The right to redeem and pay the bond at face value after notice was reserved—nothing else. *Did the United States give notice of*

a *bona fide* purpose so to redeem and pay? If not they cannot properly claim to have exercised their option to mature the obligation. That they did not honestly comply with this necessary preliminary becomes obvious upon consideration of the circumstances and pertinent legislation.

There is no question here concerning the Government committing itself through notice sent out by the Secretary of the Treasury expressly or indirectly to a forbidden medium of payment. No question of an anticipatory breach of contract. The Government simply has not in good faith complied with a condition precedent. It has never given notice of purpose to pay the obligation according to its terms. Its suggestion was to make payment of another kind.

The Circuit Court of Appeals well said—

"The notice calling the bond for payment was in the usual form; and there is no question but that it would have had the effect of stopping the running of interest and avoiding the coupons maturing after June 15, 1935, except for the legislation of Congress effecting the currency, which limited the power of the Secretary of the Treasury and must be read into the notice. At the time of the issuance of the bond the gold dollar was the standard of value in our monetary system and was defined by law as consisting of twenty-five and eight tenths grains of gold nine-tenths fine. Act of Mar. 14, 1900, c. 41, sec. 1, 31 Stat. 45, 31 U. S. C. A. 314. And the statutes provided for the use of gold coin as a medium of exchange. R. S. 3511. By Presidential Proclamation of January 31, 1934, issued under the act of May 12, 1933 (38 Stat. 52, 53), as amended by the act of January 30, 1934 (48 Stat. 342), the content of the dollar was reduced to 15-5/21 grains of gold nine-tenths fine; and, at the time of the publication of the notice calling the bond for payment, gold coin had been withdrawn from circulation, its possession had been prohibited under penalty, and payment in gold coin by the United States had been prohibited. 48 Stat. 337, 340. By joint resolution of June 5, 1933 (48 Stat. 112, 113), the payment of gold clause bonds in any legal tender currency 'dollar for dollar' had been authorized; and it was paper currency based on the 15-5/21 grain dollar, and nothing else, that was offered in payment of gold clause bonds which were called for payment by the Treasury. The notice of redemption calling the bond in question for payment was equivalent, therefore, to a notice that the United States elected to redeem the bond in paper currency based on a 15-5/21 grain dollar, notwithstanding that it was payable in gold coin based on a 25-8/10 grain dollar and might be redeemed only at its face value."

. . .

"It is manifest that when the bonds were payable in gold coin of the standard of value at the time of issue, i. e., 25.8/10 grains of

gold to the dollar, a proposal to redeem them in paper money based upon 15-5/21 grains of gold to the dollar was not a proposal to redeem them at face value; and a notice that the government would redeem them on such basis, which is what the notice in question means when considered as it must be in connection with the legislation binding upon the Secretary of the Treasury, was not such a notice as the bonds prescribed for the exercise of the option retained by the government."

We are not now concerned with the power of the United States to discharge obligations at maturity in depreciated currency or clipped coin. Did they cause respondent's bond to mature before the ultimate due date by proper exercise of the option reserved when they sent out a notice which in effect stated that payment would not be made as provided by the bond, but otherwise? The answer ought not to be difficult where men anxiously uphold the doctrine that a contractual obligation "remains binding upon the conscience of the sovereign" and reverently fix their gaze on the Eighth Commandment.

We concur in the views tersely expressed in the following paragraph excerpted from the opinion below—

"No amount of argument can obscure the real situation. It is this: The government has promised to pay the bonds in question in gold coin of the standard of value prevailing in 1917. By their terms, it is permitted to redeem them only by paying them at their face value. It is proposed to redeem them, not by paying them at that face value, but in paper money worth only about 59 per cent thereof. The notice which it has issued means this and nothing else. Such a notice is not in accordance with the condition of redemption specified in the bond, and consequently does not stop the running of interest or avoid the coupons."

The challenged judgment was correct and should be affirmed.